

5-30-2014

Sevy v. SVL Analytical, Inc. Clerk's Record v. 1 Dckt. 41994

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

KELLI SEVY,

Claimant/Appellant,

v.

SVL ANALYTICAL, INC., Employer and
STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO INDUSTRIAL SPECIAL
INDEMNITY FUND.

Defendants/Respondents.

SUPREME COURT NO. 41994

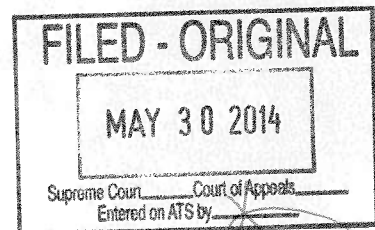
AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

2006 -
526107



Attorney for Respondent Employer/Surety:

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-1312

Attorney for Respondent ISIF:

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

41994

ORIGINAL

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

KELLI SEVY,

Claimant/Appellant,

v.

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AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

Attorney for Respondent Employer/Surety:

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-1312

Attorney for Respondent ISIF:

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2011 MAY 30 AM 9:05

 **ORIGINAL**

TABLE OF CONTENTS

EXHIBIT LIST	i
WORKER'S COMPENSATION COMPLAINT, filed March 31, 2008	1
AMENDED WORKER'S COMPENSATION COMPLAINT, filed April 7, 2008	4
ANSWER TO COMPLAINT, filed April 10, 2008	7
SECOND AMENDED WORKER'S COMPENSATION COMPLAINT, filed April 11, 2008	9
ANSWER TO AMENDED COMPLAINT, filed April 16, 2008	12
ANSWER TO SECOND AMENDED COMPLAINT, filed April 23, 2008	14
NOTICE OF INTENT TO FILED AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF), filed February 14, 2011	16
WORKERS' COMPENSATION COMPLAINT AGAINST ISIF, filed March 28, 2011.....	36
ISIF ANSWER TO COMPLAINT, filed May 24, 2011	37
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION, dated December 17, 2011	40
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, filed January 9, 2013	56
MOTION FOR RECONSIDERATION, filed January 24, 2013	86
ORDER DENYING RECONSIDERATION, FILED February 14, 2014	89
NOTICE OF APPEAL, filed March 24, 2014.....	100
CERTIFICATE OF APPEAL, dated March 27, 2014.....	105
CERTIFICATION OF APPEAL, dated March 27, 2014.....	107
CERTIFICATION OF RECORD, dated April 17, 2014.....	108
NOTICE OF COMPLETION, dated April 17, 2014.....	109

INDEX

AMENDED WORKER’S COMPENSATION COMPLAINT, filed April 7, 2008	4
ANSWER TO AMENDED COMPLAINT, filed April 16, 2008	12
ANSWER TO COMPLAINT, filed April 10, 2008	7
ANSWER TO SECOND AMENDED COMPLAINT, filed April 23, 2008	14
CERTIFICATE OF APPEAL, dated March 27, 2014.....	105
CERTIFICATION OF APPEAL, dated March 27, 2014	107
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NOTICE OF INTENT TO FILE AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF), filed February 14, 2011	16
ORDER DENYING RECONSIDERATION, FILED February 14, 2014	89
SECOND AMENDED WORKER’S COMPENSATION COMPLAINT, filed April 11, 2008	9
WORKER’S COMPENSATION COMPLAINT, filed March 31, 2008	1
WORKERS’ COMPENSATION COMPLAINT AGAINST ISIF, filed March 28, 2011.....	36

EXHIBITS LIST

Reporter's Transcript:

Hearing held March 2, 2012 - Reporter's Transcript will be lodged with the Supreme Court.

Claimant's Exhibits:

- A. Dan Brownell reports
- B. SkillTRAN reports
- C. Discover TABE 9 & 10
- D. Curriculum Vitae of Daniel W. Brownell

Defendants' Exhibits:

- 1. Medical records of Jeffrey Larson, M.D.
- 2. Medical records of J. Craig Stevens, M.D.
- 3. Medical records of Kootenai Medical Center
- 4. Medical records of Anthony Branz, M.D.
- 5. Medical records of Scott Magnuson, M.D.
- 6. Medical records of Edward D. Ellison, M.D.
- 7. Medical records of Mountain Health Care
- 8. Medical records of John McNulty, M.D.
- 9. Medical records of Shoshone Medical Center
- 10. Medical records of Mark Bengston, MPT, Functional Capacity Evaluation
- 11. Medical records of Kellogg Physical Therapy
- 12. Employer records
- 13. Records of Industrial Commission Rehabilitation Division
- 14. Deposition transcript of Kelli Lynn Sevy of February 20, 2009
- 15. Benefit breakdown
- 16. Medical records of Shoshone Medical Center from 5/3/08 to 2/1/11
- 17. Medical records from Kootenai Medical Center
- 18. Deposition transcript of Kelli Lynn Sevy of November 15, 2011
- 19. Vocational report of Nancy J. Collins, Ph.D.
- 20. Curriculum Vitae of Jeffrey Larson, M.D.
- 21. Handwritten document, dated January 31, 2012
- 120. Claimant's Answers to Defendant ISIF's First Set of Interrogatories to Claimant

Depositions:

1. Jeff Truthan, taken March 6, 2012
2. Mark Bengtson, taken March 6, 2012
3. Nancy Jean Collins, taken March 29, 2012
4. Jeffrey J. Larson, taken April 23, 2012

Additional Documents:

1. Claimant's post-hearing opening brief, filed, July 17, 2012
2. Defendant ISIF's post-hearing brief, filed August 8, 2012
3. Defendants Employer/Surety post-hearing brief, filed August 9, 2012
4. Claimant's post-hearing reply brief, filed August 27, 2012
5. Claimant's Brief in Support of Motion for Reconsideration, filed January 29, 2013
6. Defendants Employer/Surety brief in opposition to motion for reconsideration, filed February 4, 2013
7. Defendant ISIF's response to motion for reconsideration, filed February 7, 2013
8. Claimant's Response to Defendants' Briefs Regarding Motion for Reconsideration, filed February 8, 2013

WORKER'S COMPENSATION COMPLAINT
INDUSTRIAL COMMISSION NO.

06-526107

Claimant Kelli Sevy
C/O Starr Kelso
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Claimant's Attorney:
Starr Kelso
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Telephone Number: 208-765-3260

Employer's Name And Address (at time of injury)
SVL Analytical, Inc.
P.O. Box 929
Kellogg, Idaho 83837

**Worker's Compensation Insurance Carrier's
(Not Adjustor's) Name And Address:**
State Insurance Fund
P.O. Box 83720
Boise, Idaho 83720-0044

CLAIMANT'S [REDACTED]

CLAIMANT'S [REDACTED]

**DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL
DISEASE:** 10-31-06

STATE AND COUNTY IN WHICH INJURY OCCURRED:
Benewah County, Idaho

**WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE
WEEKLY WAGE OF \$7.50 per hour PURSUANT TO §72-419,
IDAHO CODE**

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED):
Tripped over dog

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE:
Neck and back

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME:
medicals, lost time, retraining,, attorney fees

**DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO
EMPLOYER:** 11-07-06

TO WHOM YOU GAVE NOTICE:
Donella Moody and Crystal Sevy

HOW NOTICE WAS GIVEN: ORAL x WRITTEN x OTHER, PLEASE SPECIFY _____

ISSUE OR ISSUES INVOLVED:
1. medical and compensation benefits
2. retraining
3. attorney fees and punitive costs

**DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF YES, PLEASE
STATE WHY:** No.

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C.
1002**

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Jeffrey Larson, M.D.
Coeur d'Alene, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Total Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? Total Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. X YES ☐ NO

DATE: 3-27-08

SIGNATURE OF CLAIMANT OR ATTORNEY: *Stanley*

**PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS**

NAME AND [REDACTED] SECURITY NUMBER
OF PARTY FILING COMPLAINT?

DATE OF DEATH:

RELATION OF DECEASED TO CLAIMANT:

WAS CLAIMANT DEPENDENT ON DECEASED:

☐ YES ☐ NO

DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT:

☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 37 day of March, 2008, I caused to be served a true and correct copy of the foregoing Complaint upon:

SVL Analytical Inc..

State Insurance Fund

P.O. Box 929

P.O. Box 83720

Kellogg, Idaho 83837

Boise, Idaho 83720-0044

via: ☐ personal service of process

X regular U.S. Mail

☐ I HAVE NOT SERVED A COPY OF THE COMPLAINT ON ANYONE

Stanley

Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, PO Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

INDUSTRIAL COMMISSION
PO BOX 83720
BOISE ID 83720-0041

Patient Name: Kelli L. Sevy
Birth Date: _____
Address: _____
Phone Number: _____
SSN or Case Number: _____

(Provider Use Only)
Medical Record Number: _____
☐ Pick up Copies ☐ Fax Copies # _____
☐ Mail Copies
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose or need for data: _____

(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

X Kelli L. Sevy
Signature of Patient

11-2-07
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act

Date

Signature of Witness

Title

Date

Original: Medical Record Copy: Patient

Complaint - Page 3 of 3

AMENDED**WORKER'S COMPENSATION COMPLAINT
INDUSTRIAL COMMISSION NO. 06-526107**

Claimant Kelli Sevy
C/O Starr Kelso
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Claimant's Attorney:
Starr Kelso
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Telephone Number: 208-765-3260

Employer's Name And Address (at time of injury)
SVL Analytical, Inc.
P.O. Box 929
Kellogg, Idaho 83837

**Worker's Compensation Insurance Carrier's
(Not Adjustor's) Name And Address:**
State Insurance Fund
P.O. Box 83720
Boise, Idaho 83720-0044

CLAIMANT'S [REDACTED]

CLAIMANT'S [REDACTED]

**DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL
DISEASE:** 10-31-06

STATE AND COUNTY IN WHICH INJURY OCCURRED:
Shoshone County, Idaho

**WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE
WEEKLY WAGE OF \$7.50 per hour PURSUANT TO §72-419,
IDAHO CODE**

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED):
tripped over dog

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE:
neck and back

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME:
medicals, lost time, retraining, attorney fees, impairment, disability

**DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO
EMPLOYER:** 11-07-06

TO WHOM YOU GAVE NOTICE:
Donella Mooday and Crystal Sevy

HOW NOTICE WAS GIVEN: ORAL x WRITTEN x OTHER, PLEASE SPECIFY _____

ISSUE OR ISSUES INVOLVED:
1. medical and compensation benefits
2. retraining
3. attorney fees and punitive costs
4. impairment and disability

**DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF YES, PLEASE
STATE WHY:** No.

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C.
1002**

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)
Jeffrey Larson
Coeur d'Alene, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Total Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? unknown
WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? Total Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. X YES ☐ NO

DATE: 4-4-08 SIGNATURE OF CLAIMANT OR ATTORNEY: [Signature]

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND [REDACTED] SECURITY NUMBER OF PARTY FILING COMPLAINT?	DATE OF DEATH:	RELATION OF DECEASED TO CLAIMANT:
WAS CLAIMANT DEPENDENT ON DECEASED: <input type="checkbox"/> YES <input type="checkbox"/> NO	DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT: <input type="checkbox"/> YES <input type="checkbox"/> NO	

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of April, 2008, I caused to be served a true and correct copy of the foregoing Complaint upon:

K.C. Construction Liberty Northwest Insurance Corporation
2025 West Dakota P.O. Box 7507
Hayden Lake, Idaho 83835 Boise, Idaho 83707-1507

via: ☐ personal service of process
X regular U.S. Mail

☐ I HAVE NOT SERVED A COPY OF THE COMPLAINT ON ANYONE

[Signature]
Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, PO Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

INDUSTRIAL COMMISSION
PO BOX 83720
BOISE ID 83720-0041

Patient Name: Kelli L. Sevy
Birth Date: _____
Address: _____
Phone Number: _____
SSN or Case Number: _____

(Provider Use Only)
Medical Record Number: _____
☐ Pick up Copies ☐ Fax Copies # _____
☐ Mail Copies
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Kelli L. Sevy
Signature of Patient

11-2-07
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act

Date

Signature of Witness

Title

Date

APPENDIX III

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

IC1003 (Rev. 11/91)

ANSWER TO COMPLAINT
I.C. NO. 06-526107

CLAIMANT'S NAME AND ADDRESS Kelli Sevy c/o Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816
EMPLOYER'S NAME AND ADDRESS SVL Analytical, Inc. P. O. Box 929 Kellogg, ID 83837	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund 1215 W. State Street Boise ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) H. James Magnuson, Attorney PO Box 2288 Coeur d'Alene ID 83816-2288	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

- ☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- ☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	
X	
X	
	X
	N/A
X	
	N/A
X	
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ☐ entirely ☐ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

None.

(COMPLETE OTHER SIDE)

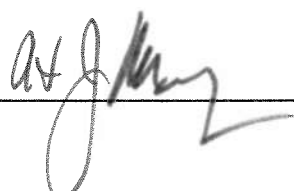
Answer-Page 1 of 2

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
2. Defendants allege Claimant's condition is attributable in whole or in part to a preexisting injury, infirmity, or condition.
3. Defendants deny that Claimant's condition is a result of an accident arising out of and in the course of her employment and, therefore, deny that she is entitled to any benefits.
4. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury.
5. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO				
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? If SO, PLEASE STATE. No.				
Amount of Compensation Paid to Date			Dated April <u>8</u> , 2008	Signature of Defendant or Attorney 
PPD	TTD	Medical		
\$3,107.50	\$6,061.05	\$46,748.91		

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of April, 2008, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

Kelly Sevy
c/o Starr Kelso
P. O. Box 1312
Coeur d'Alene, ID 83816

EMPLOYER AND SURETY'S NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable)

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail


Signature

Answer--Page 2 of 2

8

**SECOND AMENDED
WORKER'S COMPENSATION COMPLAINT
INDUSTRIAL COMMISSION NO. 06-526107**

Claimant Kelli Sevy
C/O Starr Kelso
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Claimant's Attorney:
Starr Kelso
P.O. Box 1312
Coeur d'Alene, Idaho 83816

Telephone Number: 208-765-3260

Employer's Name And Address (at time of injury)
SVL Analytical, Inc.
P.O. Box 929
Kellogg, Idaho 83837

**Worker's Compensation Insurance Carrier's
(Not Adjustor's) Name And Address:**
State Insurance Fund
P.O. Box 83720
Boise, Idaho 83720-0044

CLAIMANT'S [REDACTED]

CLAIMANT'S [REDACTED]

**DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL
DISEASE:** 10-31-06

STATE AND COUNTY IN WHICH INJURY OCCURRED:
Shoshone County, Idaho

**WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE
WEEKLY WAGE OF \$7.50 per hour PURSUANT TO §72-419,
IDAHO CODE**

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED):
tripped over dog

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE:
neck and back

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME:
medicals, lost time, retraining, attorney fees, impairment, disability

**DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO
EMPLOYER:** 11-07-06

TO WHOM YOU GAVE NOTICE:
Donella Mooday and Crystal Sevy

HOW NOTICE WAS GIVEN: ORAL ☒ WRITTEN ☐ OTHER, PLEASE SPECIFY _____

ISSUE OR ISSUES INVOLVED:
1. medical and compensation benefits
2. retraining
3. attorney fees and punitive costs
4. impairment and disability

**DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF YES, PLEASE
STATE WHY:** No.

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C.
1002**

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Jeffrey Larson
Coeur d'Alene, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Total Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? Total Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. X YES ☐ NO

DATE:

4-8-08

SIGNATURE OF CLAIMANT OR ATTORNEY:

Stankele

**PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS**

NAME AND [REDACTED] SECURITY NUMBER
OF PARTY FILING COMPLAINT?

DATE OF DEATH:

RELATION OF DECEASED TO CLAIMANT:

WAS CLAIMANT DEPENDENT ON DECEASED:

☐ YES

☐ NO

DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT:

☐ YES

☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of April, 2008, I caused to be served a true and correct copy of the foregoing Complaint upon:

SVL Analytical, Inc.

State Insurance Fund

P.O. Box 929

P.O. Box 83720

Kellogg, Idaho 83837

Boise, Idaho 83720-0044

via: ☐ personal service of process

X regular U.S. Mail

☐ I HAVE NOT SERVED A COPY OF THE COMPLAINT ON ANYONE

Stankele

Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, PO Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

INDUSTRIAL COMMISSION
PO BOX 83720
BOISE ID 83720-0041

Patient Name: Kelli L. Seay
Birth Date: _____
Address: _____
Phone Number: _____
SSN or Case Number: _____

(Provider Use Only)
Medical Record Number: _____
☐ Pick up Copies ☐ Fax Copies # _____
☐ Mail Copies
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address _____
City _____ State _____ Zip Code _____

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____
☐ Discharge Summary
☐ History & Physical Exam
☐ Consultation Reports
☐ Operative Reports
☐ Lab
☐ Pathology
☐ Radiology Reports
☐ Entire Record
☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
☐ Psychiatric or Mental Health Information
☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Kelli L. Seay 11-2-07
Signature of Patient Date

Signature of Legal Representative & Relationship to Patient/Authority to Act Date

Signature of Witness Title Date

Original Medical Record Copy Patient

APPENDIX III

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

IC1003 (Rev. 11/91)

ANSWER TO AMENDED COMPLAINT

I.C. NO. 06-526107

CLAIMANT'S NAME AND ADDRESS Kelli Sevy c/o Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816
EMPLOYER'S NAME AND ADDRESS SVL Analytical, Inc. P. O. Box 929 Kellogg, ID 83837	WORKERS' COMPENSATION INSURANCE <u>CARRIER'S</u> (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund 1215 W. State Street Boise ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) H. James Magnuson, Attorney PO Box 2288 Coeur d'Alene ID 83816-2288	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:

☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	
X	
X	
	X
	N/A
X	
	N/A
X	
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ☐ entirely ☐ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

None.

(COMPLETE OTHER SIDE)

Answer--Page 1 of 2

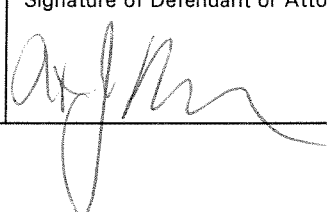
12

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
2. Defendants allege Claimant's condition is attributable in whole or in part to a preexisting injury, infirmity, or condition.
3. Defendants deny that Claimant's condition is a result of an accident arising out of and in the course of her employment and, therefore, deny that she is entitled to any benefits.
4. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury.
5. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO				
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? If SO, PLEASE STATE. No.				
Amount of Compensation Paid to Date			Dated April <u>14</u> , 2008	Signature of Defendant or Attorney 
PPD	TTD	Medical		
\$3,107.50	\$6,061.05	\$46,748.91		

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of April, 2008, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

EMPLOYER AND SURETY'S NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable)

Kelly Sevy
c/o Starr Kelso
P. O. Box 1312
Coeur d'Alene, ID 83816

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

Signature


Answer--Page 2 of 2

APPENDIX III

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

IC1003 (Rev. 11/91)

ANSWER TO SECOND AMENDED COMPLAINT

I.C. NO. 06-526107

CLAIMANT'S NAME AND ADDRESS Kelli Sevy c/o Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816
EMPLOYER'S NAME AND ADDRESS SVL Analytical, Inc. P. O. Box 929 Kellogg, ID 83837	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund 1215 W. State Street Boise ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) H. James Magnuson, Attorney PO Box 2288 Coeur d'Alene ID 83816-2288	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:

☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	
X	
X	
	X
	N/A
X	
	N/A
X	
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ☐ entirely ☐ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

None.

(COMPLETE OTHER SIDE)

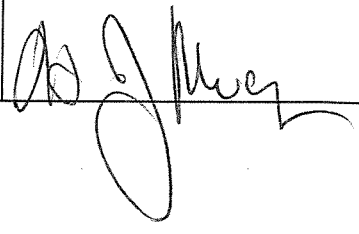
Answer--Page 1 of 2

14

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.
1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
 2. Defendants allege Claimant's condition is attributable in whole or in part to a preexisting injury, infirmity, or condition.
 3. Defendants deny that Claimant's condition is a result of an accident arising out of and in the course of her employment and, therefore, deny that she is entitled to any benefits.
 4. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury.
 5. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? If SO, PLEASE STATE. No.		
Amount of Compensation Paid to Date		
PPD	TTD	Medical
\$3,107.50	\$6,061.05	\$46,748.91
Dated April 21, 2008		Signature of Defendant or Attorney 

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of April, 2008, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

Kelly Sevy
c/o Starr Kelso
P. O. Box 1312
Coeur d'Alene, ID 83816

EMPLOYER AND SURETY'S NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable)

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail


Signature

Answer--Page 2 of 2

FAX -

FILED

**NOTICE OF INTENT TO FILE
A WORKERS' COMPENSATION COMPLAINT
AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND INDUSTRIAL COMMISSION**

Claimant's Name and Address KELLI SEVY c/o STARR KELSO P.O. Box 1312 Coeur d'Alene ID 83816-1312	Claimant's Attorney's Name and Address STARR KELSO P.O. Box 1312 Coeur d'Alene ID 83816-1312
Employer's Name and Address SVL Analytical Inc P.O. Box 929 Kellogg ID 83837	Employer's Attorney's Name and Address H. JAMES MAGNUSON P.O. Box 2288 Coeur d'Alene ID 83816-2288
Claimant's Social Security Number 567-33-2458	
Claimant's Date of Birth 04/13/1963	
IC Number of Current Claim 06-526107	Surety's Name and Address (Not Adjuster's) STATE INSURANCE FUND 1215 W. STATE STREET BOISE ID 83720-0044
Claimant's Occupation Lab Tech.	
Date of the Most Recent Injury 10/31/2006	Claimant's Weekly Wage \$7.50 per hour
Description of how injury occurred. Tripped and fell landing on a concrete floor hitting head	
Nature and cause of pre-existing impairment or condition. Submit documentation. Prior Spine injury - SEE REPORT of DR. STEVENS DATED 10/31/2007	
What factors render the Claimant totally and permanently disabled? Submit documentation. Age, education, training, Lost Labor MARKET ACCESS, Prior Physical Conditions and this injury SEE FCE Report from Pinnacle Physical Therapy.	
What impairment ratings has the Claimant received and from whom? Submit documentation. SEE attached report of DR. STEVENS	

72-334. FILING NOTICE OF CLAIM WITH THE INDUSTRIAL SPECIAL INDEMNITY FUND -- RECORDS TO BE INCLUDED WITH NOTICE OF CLAIM "...claim shall include, but not be limited to, a detailed statement describing the disability claim and supporting documentation including relevant medical and vocational rehabilitation records."

CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing document(s) was served on this 14th day of February 2011 in the following manner to:

H. JAMES MAGNUSON

☐ Mailed;
☐ Hand-Delivered;
☒ Faxed 666-1700

State Insurance Fund
215 W State Street
Boise ID 83720-0044

☒ Mailed;
☐ Hand-Delivered;
☐ Faxed

SVL Analytical
P.O. Box 929
Kellogg ID 83837

☒ Mailed;
☐ Hand-Delivered;
☐ Faxed

Industrial Special Indemnity Fund
Department of Administration
P.O. Box 83720
Boise ID 83720-7901

☒ Mailed;
☐ Hand-Delivered;
☐ Faxed

BY: 

Starr Kelso

AUTHORIZATION FOR RELEASE OF INFORMATION

Patient Information:

Kelli Savv 4/13/53 567-33-2458
Name DOB SSN

I hereby authorize the use or release/disclosure of protected health information regarding the above named individual as described herein. I understand that this authorization is voluntary and made at my direction. I understand that, if the person(s) or organization(s) that I authorize to receive the protected health information are not subject to federal and state health information privacy issues, subsequent disclosure by such person(s) or organization(s) may not be protected by those laws.

1. The following class of person(s) and/or organizations is authorized to disclose the protected health information (as specified below):

☒ Hospitals ☒ Physicians ☐ Other _____

2. I authorize the following person(s) and/or organization(s) to receive the protected health information:

3. I understand that the purpose for the use or disclosure of the protected health information is to evaluate, assess, validate, process or administer my worker's compensation claim.

4. Specific information to be released/disclosed is as specified:

☒ Complete Medical Record ☐ Other _____

5. SPECIFIC AUTHORIZATION: I understand that my health information to be released or disclosed MAY INCLUDE information that is related to sexually transmitted disease, acquired immunodeficiency syndrome (AIDS), or human immunodeficiency virus (HIV), behavioral or mental health services, and/or treatment for alcohol and/or drug abuse. My signature at the bottom of this page authorizes release of all such information, except: _____

6. I understand that I may revoke this authorization at any time by sending a letter to the person or organization releasing or disclosing the protected health information except to the extent that information has already been released or disclosed pursuant to this authorization. I understand that I may inspect or copy any information disclosed under this authorization. I understand that the provider may not condition treatment, payment, enrollment or eligibility for benefits upon the execution of this authorization.

7. This authorization expires on _____ in the event that no date is specified, this authorization expires in 6 months.

I have read and considered the contents of this authorization and I confirm that the contents are consistent with my decision.

A photocopy of authorization shall be valid and shall be accepted with the same effect as the original.

Kelli Savv 1-29-11
Signature of patient or legal representative Date

(If signed by a legal representative, documents to prove authority to sign for patient are attached.)

J. CRAIG STEVENS, MDPHYSICAL MEDICINE AND REHABILITATION
OCCUPATIONAL HEALTH
ELECTROMYOGRAPHY - ELECTRODIAGNOSIS1300 East Mullan
Suite 600
Post Falls, ID 83854
800-613-1580Bonner General Hospital : PMR
520 N. 3rd Ave
Sandpoint, Idaho 83864
FAX 208-166-0440Correspondence:
PO Box 353
Clark Fork, ID 83811
208-266-1677**INDEPENDENT MEDICAL EVALUATION**

CLAIMANT NAME: KELLI L. SEVY
EMPLOYER: SVI ANALYTICAL INC.
CLAIM#: 200620516
DOI: OCTOBER 31, 2006
REQUESTOR: LORI L. BOWLES, CLAIMS EXAMINER
STATE INSURANCE FUND
DATE: OCTOBER 3, 2007

Dear Ms. Bowles,

Thank you for referring Kelli Sevy to me for independent medical evaluation. I have reviewed the medical records provided, that extend from her date of injury of October 31, 2006, to the present. You have also provided me with extensive previous medical records, which reveal not only her previous neck surgery but also a prior neck injury subsequent to that surgery; in addition to coexisting lumbar factors and knee symptoms. Ms. Sevy presented me with multiple x-ray and MRI images in CD format which I reviewed and correlated with the various radiologic reports. She has signed the appropriate authorization that allows for this evaluation and the forwarding of this report to State Insurance Fund. She understands that the purpose of this evaluation is for me to respond to the specific questions posed in the letter requesting this IME; and that I am not seeing her in the context of a treating physician.

This 44-year-old female was approximately 3 years into her employment with SVI Analytical Company; a company that analyzes soil and various biologic samples, when she indicates she was injured when she tripped over a dog and fell forward onto her outstretched arms. She states that the dog was still underneath her at that point and she was afraid of crushing the dog so she then rolled to the side and landed hard on the concrete floor, stating that she then struck the back of her head on the floor. She indicates following that she noted increase in neck pain. This injury occurred 4 months after a prior cervical discectomy and anterior fusion at C5-C6. That surgery was performed for cervical disk degeneration and cervical radiculopathy (not an injury-caused condition). Ms. Sevy indicates that her increase in neck pain persisted.

Review of the medical records provided, reveals that she eventually presented for medical evaluation to Dr. Jeffrey Larson on November 15, 2006. Dr. Larson was the physician who had performed her prior surgery. Dr. Larson obtained flexion-extension x-rays of the cervical spine and reported that they revealed a lucency at the inferior aspect of the graft in flexion as compared with extension, and he interpreted that as consistent with a failure of her fusion (equals pseudoarthrosis or fracture of the fusion).

5310112007002

KELLI L. SEVY
IME: OCTOBER 3, 2007
PAGE 2

Dr. Larson then ordered further imaging. Ms. Sevy underwent MRI of the cervical spine on December 5, 2006, that study revealed status post anterior fusion from C5-C6 with no evidence of spinal stenosis or foraminal encroachment. Other levels were reported to be essentially unchanged. A CT of the cervical spine was also obtained on the same date and reported to reveal intact fusion with improvement in bony spinal stenosis. Subsequently that CT was re-read, presumably at the request of Dr. Larson, and an addendum was generated indicating "a well demarcated lucency between the bone graft and the C6 vertebral body, consistent with a pseudoarthrosis."

The claimant was subsequently seen by Dr. Larson on December 12, 2006, and noted to have increasing complaint of neck pain with pain radiation into the right arm and hand and it was reported that these were new symptoms that had occurred only since her injury. He recommended proceeding with repeat surgery.

Her second cervical surgery occurred on January 19, 2007, and according to the operative note consisted of a posterior fusion at C5-C6 with interspinous wiring as well as a right-sided C5-C6 laminectomy and foraminotomy. This was a posterior approach as compared with the prior surgery which was an anterior approach; thus the status of the fracture of the fusion was not commented upon within the operative portion of the report as that anterior fusion site was not directly viewed at the time of surgery.

A subsequent x-ray report dated February 28, 2007, includes flexion-extension views of the cervical spine and the report states that there was no abnormal movement noted on flexion-extension and that the instrumentation was intact.

A followup note of April 24, 2007, notes that the claimant was improving but was still experiencing neck pain and muscle spasms. Coexisting complaint of low back pain was also noted as well as her prior history of the L2 kyphoplasty performed by Dr. Keiper several years earlier. I will discuss that factor later on review of the prior records. He noted that she exhibited "good range of motion of her cervical spine" and that upper extremity strength was reported as normal. Cervical spine films - flexion-extension views, were repeated on that date and revealed again her intact hardware. It was noted that she was describing increasing low back pain and Dr. Larson also noted that "she would like to go on disability for her spine." Dr. Larson felt that she was not disabled in regard to her neck but appeared to leave open the possibility in regard to her lumbar region. He felt that she would be able to lift 70 lbs and thus meet the requirements of returning to work. He recommended further workup in regard to her lumbar complaints.

The next followup by Dr. Larson occurred on June 5, 2007, and at that stage the claimant described increasing neck pain with pain radiating to the left arm and numbness present in the right arm. It was noted that she had sustained a fall after returning to work. She was actually doing fine at work but then she fell into a sinkhole while fishing and that after that experienced increase in her neck pain and felt "a pain" in her neck. It was noted in the interim she had seen her primary care physician (Dr. Bayard Miller - I am not provided with any of his notes in this timeframe) and that she had been placed on Cymbalta and Xanax. Dr. Larson noted no upper extremity neurologic deficits and negative Spurling's sign. He noted a slight reduction in range of motion of extension of the cervical spine. He recommended at that stage that she undergo an MRI of the cervical spine. Plain x-rays of the cervical spine obtained on the date of the evaluation revealed intact hardware.

5310112007003

KELLI L. SEVY
IME: OCTOBER 3, 2007
PAGE 3

Cervical spine MRI obtained on June 23, 2007, at KMC revealed intact fusion at C5-C6 and mild spondylitic changes at C4-C5 and C5-C6, essentially unchanged from the prior surgery.

Dr. Larson saw her in followup on July 10, 2007, and appeared to indicate that she was approaching maximal medical improvement. He did recommend a functional capacity evaluation for determination of her return to work status.

The functional capacity evaluation was performed at Pinnacle Physical Therapy in Post Falls on August 1, 2007. I carefully reviewed the findings of that FCE. Limitations that were identified were that the claimant had difficulties with overhead work and that she would have difficulty performing lifting amounts greater than 45 lbs and that she should be allowed frequent changes of position. However further review of that report reveals that the difficulties with lifting related to lumbar and thoracic complaints and pain and function and not her neck. The only affect of her neck on her function was some difficulty with looking upward for prolonged periods.

The claimant was subsequently seen in followup by Dr. Larson on August 7, 2007. He noted at that point "she complains mostly of lower back pain" and that her neck hurt her only if she were doing her "usual labor." He noted that because she was not able to lift the 70 lbs, per the FCE, that she would likely not be able to return to work. He did not comment on which of her conditions caused that reduced ability. He noted that the most recent MRI of her lumbar spine, which had been performed on April 19, 2005, suggested a new fracture. He recommended obtaining an MRI of the lumbar spine for further diagnostic information. The claimant indicates that that MRI is scheduled for November 6, 2007.

No further records are available to me and the claimant concurs that she has undergone no further reevaluations by Dr. Larson.

REVIEW OF PREVIOUS RECORDS:

The earliest prior record available to me is Dr. Glenn Keiper's operative note of September 14, 2004; on that date the claimant underwent an L2 kyphoplasty. The claimant indicates that prior to that surgery she had had 2 previous injuries involving her low back, the first was a sledding accident which occurred in 2000 and the 2nd occurred when she fell off a motorized scooter going 25 miles/hour. The surgery by Dr. Keiper appears to have been a fairly straightforward balloon kyphoplasty with utilization of cement.

The next report available to me is an MRI of the lumbar spine dated April 19, 2005, which left open the possibility of a refracture at the L2 level based on acute edema adjacent to the site of the vertebroplasty. Possible extravasation of cement was noted as an additional factor. A mild T12 compression fracture was also appreciated, unchanged from the previous images.

The next note is a radiologic report of a cervical spine series obtained on March 14, 2006, which notes in the clinical portion "pain in both arms, remote trauma, (lumbar) spine surgery." The x-ray was ordered by Dr. Bayard Miller; I am not provided with the office notes of Dr. Miller in this timeframe. That x-ray revealed mild to moderate degenerative disk disease at C5-C6.

A subsequent MRI of the cervical spine ordered by Dr. Miller was performed on March 24, 2006, and again revealed degenerative disk disease greatest at C5-C6, interpreted by MRI as being severe. This was causing foraminal narrowing and spinal stenosis.

The claimant underwent subsequent neurosurgical consultation by Dr. Larson on May 2, 2006. He recommended proceeding with surgery.

KELLI L. SEVY
IME: OCTOBER 3, 2007
PAGE 4

Surgery occurred on May 15, 2006, and according to the operative note consisted of an anterior cervical discectomy and fusion at C5-C6 using prosthetic bone implant and anterior cervical plate.

A postoperative note of May 29, 2006, notes that the claimant had fallen 3 days earlier (May 26, 2006) and had increase in pain in her left arm following that fall. That fall occurred at home, the claimant indicates she tripped on some steps entering her home. It was also noted that she was describing some chest pain with the arm pain which raised the possibility of cardiac pain. Nevertheless the EKG's were obtained and it was felt that the pain was non-cardiac. A nuclear treadmill test was also recommended by Dr. Deb Elliott-Pearson on that date.

A followup evaluation for chest pain and left arm pain was noted at Shoshone Medical Center on May 30, 2001, that handwritten note is very difficult to read.

The claimant saw Dr. Larson on June 2, 2006, and he recommended that she take a Medrol Dosepak in regard to her increase in neck symptoms. Flexion-extension views of the cervical spine obtained on June 2, 2006, revealed intact hardware.

The claimant was next seen by Dr. Larson's assistant on July 6, 2006, and reported to be doing well and continuing physical therapy. X-rays were again repeated and revealed intact hardware. Catherine Rojo indicated that the claimant had improved in her symptoms after taking the Medrol Dosepak.

The next report is an x-ray of the right knee obtained at Shoshone Medical Center which revealed arthritic change of the medial compartment. She then underwent an MRI without contrast of the right knee on August 28, 2006, which was read as normal.

No further notes are available to me up until her date of injury that this IME addresses.

CURRENT STATUS:

Ms. Sevy indicates she has no baseline of neck pain at the moment of this evaluation. She states that neck pain will occur with looking upward or performing lifting; pain will typically be left-sided and extend upward toward the ear and then will also extend into the right greater than left arm. She at times notes numbness and tingling in the arms.

She states she does have a baseline of low back pain at the moment of this evaluation which she would rate as level 4 on a scale of 1 to 10. This extends into both lower extremities, right greater than left.

At the present time her current medications consist of hydrocodone 10/325; averaging 2 per day. She states that she is taking this for both neck pain and back pain. She occasionally takes OTC Tylenol. She is taking no other medications.

At the present time she is not working. She states that the reason she is not working is because her employer will not accommodate the current lift restrictions and also because she feels she is in too much pain to work. When asked to state what her current defined restrictions are, she states that she does not know them but believes it is a 20 to 40-lb lift restriction.

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KELLI L. SEVY
IME: OCTOBER 3, 2007
PAGE 5

PHYSICAL EXAMINATION:

Examination of the cervical spine reveals range of motion measurements as follows: flexion 48° active, 50° passive; extension 55° active, 58° passive; right lateral flexion 38° active, 40° passive; left lateral flexion 41° active, 49° passive; cervical rotation to 80° left and right active.

She exhibits brisk and symmetrical biceps and triceps and brachioradialis reflexes. Sensory examination revealed no dermatomal sensory loss in the upper extremities and no median or ulnar hypesthesia. She exhibits symmetrical strength of finger extension, grip, elbow flexion and extension, shoulder abduction and external rotation. She exhibits full shoulder range of motion including flexion and abduction to 175° and external rotation to 90°. She describes mild tenderness to palpation over the posterior cervical spine. Her scars are well healed. No palpable spasm. No crepitus on ranging. Normal cervical lordotic curve and cervical posture.

Lower extremity evaluation reveals brisk and symmetrical knee and ankle reflexes. Sensory examination reveals left L5 and S1 hypesthesia relative to the right. Seated SLR produces complaints of low back pain on the left to a greater extent than the right, at 90°. She exhibits symmetrical strength of toe extension, ankle dorsiflexion and knee flexion and extension.

In a standing position she allowed forward lumbar flexion to 94° as recorded at T12 simultaneous with 37° at the sacrum. She allowed extension to 22° at T12 simultaneous with 16° at the sacrum. She allowed lumbar lateral flexion to 24° to the right and 23° to the left. Waddell's testing was negative with no statements of increased low back pain with thoracic rotation left or right.

IMPRESSION AND DISCUSSION:

This claimant sustained a failure of her cervical fusion on the date of injury of October 31, 2006. I state this on a more probable than not basis, based primarily upon Dr. Larson's interpretation (and the hospital radiologist's subsequent re-edit of the CT report) of the cervical spine images. We have demonstrated intact hardware on a prior flexion-extension x-ray of the cervical spine obtained subsequent to her first surgery and also subsequent to the first injury but prior to this injury. In that intervening timeframe she apparently sustained a failure of the cervical fusion.

For this she has undergone a 2nd fusion and at this time, in regard to her cervical spine, is at a status of maximal medical improvement and medical stability. Dr. Larson appears to have indicated this also in his notes. No further treatment is indicated pertinent to her cervical spine. It is certainly possible that she may in the future experience further features of cervical disk degeneration at that level or other levels but further treatment in the future would be for a degenerative condition and not for the affects of her specific injury.

She has a coexisting lumbar condition including an L2 compression fracture with possible degree of refracture, in addition to significant lumbar degenerative disk disease suspected based on her current symptom pattern and radicular pain pattern as well as neurologic examination. Her lumbar condition was not caused by the injury that this IME addresses and was not directly affected by that injury.

KELLI L. SEVY
IME: OCTOBER 3, 2007
PAGE 6

I next direct my attention to the specific questions posed in the letter requesting this IME:

1. PHYSICAL RESTRICTIONS: The incident of October 31, 2006, and subsequent surgery of January 19, 2007, will not result in permanent work restrictions. While her most recent FCE did result in the identification of a 45 lb. lift "limitation"; those restrictions based on that would relate in their entirety to her lumbar and thoracic condition and not to her cervical condition. No restrictions are indicated pertinent to her cervical condition.
2. MEDICAL STABILITY: Dr. Larson has indeed determined that Ms. Sevy has reached medical stability in regard to her cervical condition and subsequent surgery; I agree.

IMPAIRMENT RATING: I refer to the current 5th Addition AMA Guides to the Evaluation of Permanent Impairment. I refer first to figure 15-4 on page 380 and determine that the ROM method of rating is appropriate based upon the fact that she has had more than one cervical surgery and more than one cervical related injury; and also based upon the fact that her imaging reveals more than one level of cervical degenerative disk disease. This method of rating requires the calculation of 3 separate impairment rating components: a diagnosis-based component, a loss of cervical range of motion-based component and a neurologic deficit-based component.

I refer next to table 15-7 on page 404 and determine that her current condition corresponds most closely to category IV-D which yields a 10% whole person impairment; modified upward by category IV-E-1 for her 2nd cervical fusion to yield a total diagnosis-based impairment of 12% of the whole person. The levels of disk degeneration at the other levels are not sufficient to indicate inclusion as an increase in her current impairment rating; or at the least if they are included in both her pre-injury and post-injury ratings, no net change in her impairment will result as far as apportionment. For the purposes of apportionment I determine that her condition prior to the surgery would correspond to category IV-D alone, yielding a 10% whole person impairment.

I next determine her cervical range of motion-based impairment: I refer first to table 15-12 on page 418 and determine that her cervical flexion range yields a 0% impairment and her cervical extension range yields a 0% impairment. I refer next to table 15-13 on page 420 and determine that her right lateral flexion range yields a 0% impairment and her left lateral flexion range also yields a 0% impairment. Referring next to table 15-14 on page 421 I determine that her cervical rotation range yields a 0% impairment. While her cervical ranges of motions are perhaps very slightly reduced, they are not sufficiently reduced to result in an impairment greater than 0% of the whole person (rounded or interpolated).

I note that on careful neurologic examination she exhibited no motor or sensory deficit sufficient to yield a ratable neurologic deficit impairment.

KELLI L. SEVY
IME: OCTOBER 3, 2007
PAGE 7

Ms. Sevy's current cervical-related impairment is thus determined by the combination of the component impairments of 12%, 0% and 0% to be 12% of the whole person. Her impairment rating prior to this injury had already been determined above to be 10% of the whole person; thus the increment in her impairment as a result of the injury and subsequent 2nd surgery upon her cervical spine is determined to be 2% of the whole person. That 2% whole person impairment is her apportioned impairment to the date of injury of October 31, 2006.

I received from the Idaho Industrial Commission the pertinent job site evaluation, and also a request for current work restrictions. Those forms are now completed and I have attached a copy to this narrative. Please feel free to contact me if you have any further questions or require further elaboration.

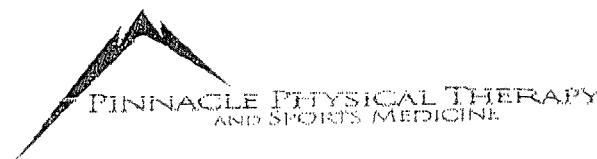
Sincerely,



J. Craig Stevens, MD, FAAPMR, CIME
Certified American Board of Physical Medicine and Rehabilitation
Certified American Board of Electrodiagnostic Medicine
Certified American Board of Independent Medical Examiners

JCS/lb

Client Name: Kelli Sevy
Claim #: SJF 2006205160/17
FCE Dates: 08/01/2007
Therapist: Mark Bengtson, MPT
Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



WorkWell Functional Capacity Evaluation

Summary Report

Name: Kelli Sevy
Test Date: 08/01/2007
Date of Birth: 04/13/1963
Gender: F
Address: 103 Elk Creek
City: Kellogg
State: Idaho
Zip Code: 83837
Phone: 208-783-7500
Physician: Dr. Bernard Miller
Employer: SVL Analytical Inc.
Primary Diagnosis: Cervical Strain

Reason for Testing

- Determine ability to return to previous job or other job.
- Recommendations to assist with return to work.
- Identify ability to perform transitional work (may include alternative or modified work)
- Recommendations for ergonomic changes or accommodation
- Determine general abilities for vocational placement

Description of Test Done

- One day Core WorkWell FCE, with UE/Hand emphasis.

Cooperation and Effort

- Client patterns of movement and physiological responses were consistent with maximal effort.
- Client gave maximal effort on 29 of 29 (100%) test items.
- Client scored satisfactorily on 13/13 (100%) of the internal consistency checks during the FCE.
- Client demonstrated cooperative behavior and was willing to work to maximum abilities in all test items.

Consistency of Performance

- Client gave maximal effort on all test items as evidenced by predictable patterns of movement including increased accessory muscle recruitment, counterbalancing and use of momentum, and physiological responses such as increased heart rate.
- Client demonstrated consistency of performance in the FCE in the following ways:
 - 1) Limited strength was noted in Bil UE's (Right). Correspondingly, she demonstrated significant functional limitations (fatigued easily secondary to weakness) in the Overhead Work Tolerance subtest.
 - 2) Weakness was observed in the Right knee, hip and total LE. Correspondingly, limitations were seen in Walking, Stairs, Standing work, and Manual Material Handling related to Right LE limping.
- Functional limitations noted are consistent with physical the impairments and diagnosis related to C5-C6 cervical fusion, and C4-C5 DDD.
- Functional limitations noted are also consistent with past or prior injury including thoracic kyphoplasty, chronic mid and LBP, and Right LE/knee injury.
- Client's perceived abilities, as measured on the Spinal Function Sort, are consistent with client's functional abilities objectively identified during the FCE. Ms. Sevy reported that she has physical abilities that match the Light physical demand level. Correspondingly, the objective results of the FCE indicate that Ms. Sevy possesses physical abilities that match the Light physical demand levels.
- Client had consistent limitations relating to mid and LBP.
- Client limitations of UE weakness and limited tolerance to Overhead Work are consistent with the referred diagnosis (C5-C6 cervical fusion, with DDD C4-C5).

Pain Report

- Reported discomfort in the mid and LB as part of the reason for limitations with Standing, Walking, and Manual Material Handling. Objective signs that included palpatory tenderness, and moderate paraspinal hypertonicity coincided with the client's reports of discomfort.

Client Name: Kelli Sevy
Claim #: SIF 2006205160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



- Client reported discomfort present in her cervical spine, and shoulders during Overhead Work tasks, but there was no interference in safety.
- Pain complaints mostly related to Mid and LBP were present constantly during testing and worsened with prolonged Standing and Walking activities as well as Manual Material Handling activities. The pain lessened once the specific activity was stopped and an alternative rest posture was adopted.
- Client performed occasional leaning onto railings, lumbar flexion while hanging from the door jam, etc. to help with pain management.

Safety

- Client demonstrated safe performance using appropriate body mechanics, work methods and pacing strategies throughout all subtests.
- Client was able to apply safety and body mechanics techniques to new situations after instruction.

Quality of Movement

- Client demonstrated safe and appropriate changes in body mechanics, including use of accessory muscles, counterbalancing and momentum, as load/force increased. These changes are expected and consistent with maximal effort.
- Asymmetry of movement was noted as Ms. Sevy was seen to limp on the Right LE during prolonged Walking activities, and when Carrying loads during Manual Material Handling subtests. Excessive counterbalancing and hyperlordosis was noted in the thoraco-lumbar junction area during Manual Material Handling activities.
- Compensatory movements such as Sitting, leaning over railings, and bending at the waist were noted during/following activities involving Material Handling. These movements did not interfere in safety.

Abilities/Strengths

- High abilities were noted in the following areas:
 - Hand Coordination/Dexterity.
 - Light physical Demand activities.
 - Work ethic and effort was exceptional despite pain complaints and indicated pathologies.

Limitations

- Significant limitations in function were noted in the following areas:
 - Overhead Work.
 - Manual Material Handling at 45 lb. or greater.
 - Sitting tolerance is limited to Frequent level secondary to the need to change positions frequently.

Potential Barriers to Return to Work

- Physical limitations present a barrier to return to work unless modifications can be made.
- Employer does not offer transitional work or assignments.
- Physical problems other than referred diagnosis prevents a match between client's physical abilities and job demands.

Job Match Grid

- Sample Receiving Technician and Extraction Lab Technician: SVL Analytical

Critical Demand from Job Description	FCE Abilities	Job Match
<u>Lift/Carry:</u> up to 70 lb. Occasional	45 lb. Occasional	No
<u>Reaching:</u> Above shoulder work Occasional	Rare	No
<u>Standing/Walking (combined):</u> up to 8 consecutive hours	Up to 8 consecutive hours	Yes
<u>Push/Pull:</u> up to 70 lb. Occasional	Push/Pull 50, 59 lb. Occasional	No

Physical Return to Work Options Explored

- The physical requirements of the client's job have been compared to the client's performance in the FCE. There is not a job match for either position with SVL Analytical. Please refer to the Job Match Grid for details.
- Recommend placement in an alternative position at the work place with Light physical demands.
- The discrepancy between client abilities and job demands in combination with the much spinal pathology may indicate limited success of rehabilitation to prior level of function. Alternative placement may be the most feasible plan.

Client Name: Kelli Sevy
Claim #: SIF 2006205160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



Therapist's Recommendation Regarding Return to Work

- Physical abilities do not match job requirements.
- Recommend job modifications or alternative placement.

US Department of Labor Physical Demand Level

- Light, with some abilities in the Light to Medium physical demand category on a Rare to Occasional basis.

Summary/Recommendations

- These projections are for 8 hours a day 5 days a week at the levels indicated on the FCE grid.
- Kelli demonstrated many functional limitations related to pre-existing thoracic and lumbar spine conditions.
- Kelli reported experiencing pain throughout her spine and Right LE/Hip as well as cervical spine throughout the FCE process. Despite the pain reports, she worked through the pain in all instances. Kelli likely worked at or slightly above her maximum physical capabilities during the FCE. I do not feel that she has the ability to successfully sustain this level of work (Medium physical demand level) at a 40 hour per week, 5 days per week basis. Due to the many pain/pathology locations, it is likely that she would not last long working at the physical demand level described in the JA for the Extraction Lab Technician position. Furthermore, the chance of re-injury to the cervical spine or other locations is high. In addition, it is noted that during the client interview for the position of injury, Kelli described Manual Material Handling activities and other physical demands even greater than those indicated on the JA.
- Long term success in an occupation would be more likely in a Sedentary to Light setting.

Signature _____

Mark Bengtson MPT

Date _____

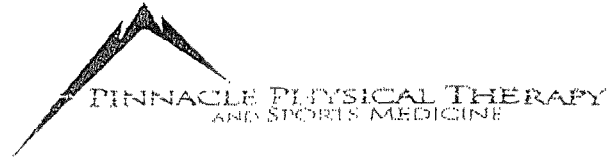
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Client Name: Kelli Sevy
Claim #: SIF 2006205160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



WorkWell FCE Test Results and Interpretation

The interpretation of WorkWell's standardized functional testing is based on assumptions including normal breaks, basic ergonomic conditions and that the tested functions are not required more than 2/3 of a normal working day. If a function is required continuously, job specific testing should be performed.

Client Name: Kelli Sevy
Test Date: 08/01/2007

Interpretation of observed function regarding activity during a normal working day

Frequency	Weighted Activities Observed Effort Level	Position/Ambulation Quantitative + Qualitative Results	% of Workday
NEVER	Contraindicated	Not Possible	0%
RARELY	Maximum	Significant Limitation	1-5%
OCCASIONALLY	Heavy	Some Limitation	6-33%
FREQUENTLY	Low	Slight/No Limitation	34-66%
SELF LIMITED	Client stopped test; submaximum effort level		Submax percent

Lifting, Strength (lbs)	Never	Max	Heavy	Low	Limitations	Recommendations
Waist to Floor (11 in. from floor)	55, 60	50	45	0	Loss of control of load at 45 lb-55 lb.	Limit lifting to 50 lb. maximum on a Rare basis (Floor to Waist)
Waist To Crown (Handles)	40	30	20	10	Increased momentum needed at 20 and 30 lb.	
Front Carry	75	65	45	30	Right LE limp progressively worsens with increased loads.	
Right Carry	45	35	20	10	Right LE limp progressively worsens with increased loads.	
Left Carry	50	45	35	20	Right LE limp progressively worsens with increased loads.	

Posture, Flexibility, Ambulation	Never	Significant Limitation	Some Limitation	Slight/No Limitation Noted	Limitations	Recommendations
Elevated Work (Unweighted)		X			Fatigue in BIL UE's (R>L) at 20 sec. and worsening throughout testing. Attempts to rest arms by lowering them. Discomfort reported in mid and LB, BIL arms. Self limiting effort evidenced by Shoulder hiking with fatigue. Elbow dropping with fatigue Low elbow positioning. Discomfort consistent with cervical extension.	

Client Name: Kelli Sevy

Claim #: SIF 2006205160/17

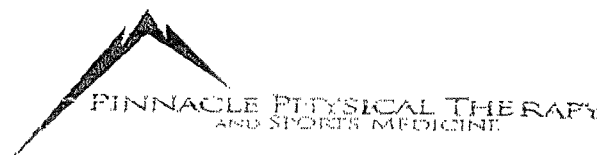
FCE Dates: 08/01/2007

Therapist: Mark Bangtson, MPT

Pinnacle Physical Therapy & Sports Medicine

1590 E Polston Ave #B

Post Falls, ID 83854



Posture, Flexibility, Ambulation	Never	Significant Limitation	Some Limitation	Slight/No Limitation Noted	Limitations	Recommendations
Forward Bending- Standing			X		Stabbing pain reported in mid back at 45 sec. C/O tightness in hips. Frequent weight shifting. Attempts to rest hands on table.	
Kneel - Half Kneel			X		Discomfort reported in LB and buttocks. Increased cramping in LB at 1 min and 27 sec. UE's getting tired at 2 min and 2 sec. Increased LBP reported at 3 min.	
Stairs			X		Unable to descend stairs smoothly after 10 steps secondary to fatigue in BIL LE's. Pace slows with steps climbed. Decreased lower extremity endurance.	
Ladder - Two Hands			X		Able to climb reciprocally. Decreased quadriceps strength. Reliance on UE use to offset LE weakness. Discomfort reported in Right knee, LB.	
Walk - 6 Min Walk Test			X		Limping on Right LE. Unable to stand comfortably after walking, requires sitting immediately after walking.	
Sitting			X		Frequent weight shifting. Used weight bearing on hands or arms. Not able to maintain symmetrical sitting posture. Discomfort reported in LB, Mid back.	

Push-Pull (Static)	Force Generated (pounds)	Limitations	Recommendations
Push (Static)	55	None	
Pull (Static)	59	None	

(Numerous variables impact Push/Pull force including load, equipment, surface, etc. These forces do not represent the amount of weight that is moved.)

Client Name: Kelli Sevy
Claim #: SIF 2006205160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #8
Post Falls, ID 83854



Hand Function

Hand/Finger Strength	Force Generated (pounds)	Mean for Age/Gender	Values for approx 2/3 of this age/gender group	Limitation	Recommendations
Hand Grip Right	65	70.4	57 - 84	None	
Hand Grip Left	78	62.3	49 - 76	None	

Hand/Finger Strength	Force Generated (pounds)	Mean for Age/Gender	Values for approx 2/3 of this age/gender group	Limitation	Recommendations
Tip Pinch Right	11	11.5	9 - 14	None	
Tip Pinch Left	11	11.1	8 - 14	None	
Palmar Pinch Right	14.33	17	14 - 20	None	
Palmar Pinch Left	14.33	16.6	13 - 20	None	
Key Pinch / Lateral Pinch Right	11.33	16.7	14 - 20	None	
Key Pinch / Lateral Pinch Left	14.67	15.8	13 - 19	None	

Coordination	Standard Score	Rating	Limitations	Recommendations
PCE Board - Peg Board Dominant Hand	130	Above Average	Right UE fatigue, achiness throughout arm related to fatigue. Strain and fatigue is noted in Left UE "it feels tired and heavy". LBP, mid back pain reported with prolonged sitting and reaching activities.	
PCE Board - Peg Board Non Dominant Hand	130	Above Average		
PCE Board - Round Blocks Dominant Hand	65	Low	fatigue in Right UE, difficulty maintaining R UE position (elevated)	
PCE Board - Round Blocks Non Dominant Hand	85	Average		

Signature _____
Date _____

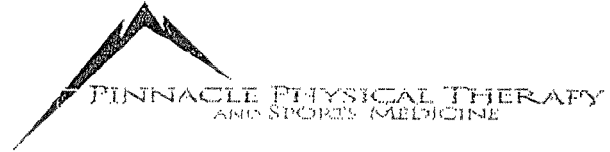
Mark Bengtson MPT
02-14-07

Client Name: Kelli Sevy
 Claim #: SIF 2006205160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
 1590 E Polston Ave #B
 Post Falls, ID 83854



WorkWell FCE Physical Exam

Systems Review

Blood Pressure: 144/93

Height: 5'6"

Heart Rate (resting): 88

Weight: 156

Gait: Normal

Coordination: WNL

Movement Characteristics (speed, smoothness, posturing): Right shoulder depressed, BIL winged scapulae, hyperlordotic lumbar spine.

Atrophy/Edema: None observed

Integumentary: Well healed incision in posterior cervical spine.

Muscle Tone/Spasms: Hypertonicity is noted in BIL UTraaps

Musculoskeletal System

Neck	Normal	Range of Motion	Muscle Strength
Flexion	45	35	5
Extension	45	30	5
Right Lateral Flexion	45	35	5
Left Lateral Flexion	45	35	5
Right Rotation	90	75	5
Left Rotation	90	75	5

Trunk	Normal	Range of Motion	Muscle Strength
Flexion	80	70	5
Extension	30	15	5
Right Lateral Flexion	35	30	5
Left Lateral Flexion	35	30	5
Right Rotation	45	40	5
Left Rotation	45	40	5

Comments/Quality of Motion - Spine

Good cervical spine ROM for 2 surgeries. Painful LB with lumbar extension. Good functional spine ROM throughout.

		Range of Motion		Muscle Strength	
Shoulder	Normal	Right	Left	Right	Left
Forward Flexion	180	165	WNL	4-	4
Extension	60	WNL	WNL	4	4
Abduction	180	160	WNL	4-	4
Internal Rotation	70	WNL	WNL	4	4
External Rotation	90	WNL	WNL	4	4

		Range of Motion		Muscle Strength	
Elbow	Normal	Right	Left	Right	Left

Client Name: Kelli Sevy
Claim #: SIF 2006206160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



		Range of Motion		Muscle Strength	
Elbow	Normal	Right	Left	Right	Left
Flexion	150	WNL	WNL	5	5
Extension	0	WNL	WNL	5	5

		Range of Motion		Muscle Strength	
Forearm	Normal	Right	Left	Right	Left
Pronation	80	WNL	WNL	5	5
Supination	80	WNL	WNL	5	5

		Range of Motion		Muscle Strength	
Wrist	Normal	Right	Left	Right	Left
Flexion	80	WNL	WNL	5	5
Extension	70	WNL	WNL	5	5
Ulnar Deviation	30	WNL	WNL	5	5
Radial Deviation	20	WNL	WNL	5	5

		Range of Motion		Muscle Strength	
Gross Hand Motion	Normal	Right	Left	Right	Left
Composite Motion		WNL	WNL	5	5

Comments/Quality of Motion - Upper Quarter

Mild weakness in Right shoulder (abduction), otherwise moderately strong throughout. No evidence of specific myotomal weakness. (-) Phalen's test

		Range of Motion		Muscle Strength	
Hip	Normal	Right	Left	Right	Left
Flexion (knee extd)	90	WNL	WNL	4	5
Flexion (knee fld)	120	WNL	WNL	4	5
Abduction	45	WNL	WNL	4	5
Adduction	30	WNL	WNL	4	5
Extension	30	WNL	WNL	4	5
Internal Rotation	45	WNL	WNL	4	5
External Rotation	45	WNL	WNL	5	5

		Range of Motion		Muscle Strength	
Knee	Normal	Right	Left	Right	Left
Flexion	135	WNL	WNL	4	5
Extension	0	WNL	WNL	4	5

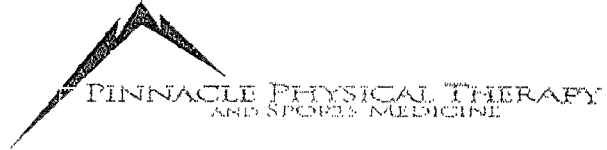
		Range of Motion		Muscle Strength	
Ankle	Normal	Right	Left	Right	Left
Plantar Flexion	50	WNL	WNL	5	5
Dorsiflexion	20	WNL	WNL	5	5

Client Name: Kelli Sevy
Claim #: SIF 2006205160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



	Normal	Range of Motion		Muscle Strength	
		Right	Left	Right	Left
Ankle					
Inversion	35	WNL	WNL	5	5
Eversion	15	WNL	WNL	5	5

Other

Toe Rise Reps	Right	20	Left	20
Knee Squat	10			

Comments/Quality of Motion - Lower Quarter

Pain with static standing in LB, R hip (13 minutes). Weakness noted in R LE/Hip, BIL LE's during squatting.

Neuromuscular System

Sensory Testing	WNL (positional numbness is reported when arms are elevated or when "I am busy with my hands").
Reflex Ankle Jerk	Brisk and = throughout all myotomes
Reflex Knee Jerk	Brisk and = throughout all myotomes
Reflex Upper Extremities	Brisk and = throughout all myotomes

Girth

Body Part	Involved	Uninvolved
N/A	N/A	N/A

Questions related to Neck Specific Involvement

Unilateral arm pain worse than neck pain?	No
Pain generally radiates to hand or fingers	No
Numbness or paresthesia in same distribution?	No
Motor, sensory or reflex changes limited to one nerve root	No
Nerve irritation signs/tension signs which reproduces UE pain	No

First Day Summary of Physical Assessment

Mild weakness is noted in BIL UE's. Normal neuro exam. Good cervical ROM. Limited tolerance to standing, sitting (static) secondary to obvious discomfort in mid and lower back as well as cervical spine.

Signature _____
Date _____

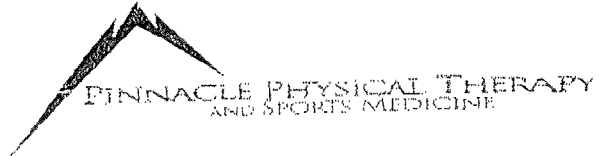
Mark Bengtson MPT
08-15-07

Client Name: Kelli Sevy
Claim #: SIF 2006206160/17

FCE Dates: 08/01/2007

Therapist: Mark Bengtson, MPT

Pinnacle Physical Therapy & Sports Medicine
1590 E Polston Ave #B
Post Falls, ID 83854



WorkWell FCE History

Name: Kelli Sevy

Dates of FCE Testing: 08/01/2007

Date of Birth: 04/13/1963

Date of Injury: 10/31/2006

Gender: F

Address: 103 Elk Creek

City/State/Zip: Kellogg, Idaho 83837

Primary Diagnosis: Strain

Area of Injury: Upper Quarter

Occupation: Extraction Lab Technician

Mechanism/Type of Injury:

Fall onto concrete when tripping over a dog at work in 10-06

Previous Treatment:

PT

Pertinent Surgery/Other Clinical Tests/Past Medical History:

C5-C6 fusion, revision of C5-C6 fusion 01-19-07. Non-related: kyphoplasty 2004. 2001: fx. lumbar vertebrae.

Current Medications:

Flexerol PRN, Hydrocodone PRN, Cymbalta

Functional Status/ Activity Level:

Not working at this time. Can't ride mtn. bike.

Chief Complaints/Symptoms:

Neck pain, weakness in UE's, limited tolerance to UE activity in elevated positions.

Return to Work Information:

not working

Goals:

Return to work

Signature _____

Date _____

ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

**WORKERS' COMPENSATION
COMPLAINT AGAINST THE
INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)**

06-526109

CLAIMANT'S NAME AND ADDRESS <u>Kelli Sevy</u> <u>103 Elk Creek Rd</u> <u>Kellogg, ID 83816</u>	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS <u>Stane Kelso</u> <u>P.O. Box 1312</u> <u>Coeur d'Alene, ID 83816</u>
EMPLOYER'S NAME AND ADDRESS <u>SVL Analytical, Inc</u> <u>P.O. Box 929</u> <u>Kellogg, ID 83837</u>	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS <u>H. James Magnuson</u> <u>P.O. Box 2288</u> <u>Coeur d'Alene, ID 83816</u>
I.C. NUMBER OF CURRENT CLAIM <u>2006-526107</u>	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS <u>State Ind. Fund</u> <u>P.O. Box 83720</u> <u>Boise, ID 83720-0044</u>
DATE OF INJURY <u>10-31-2006</u>	

NATURE AND CAUSE OF PHYSICAL IMPAIRMENT PRE-EXISTING CURRENT INJURY OR OCCUPATIONAL DISEASE:

9-14-04 failed Kyphoplasty
5-15-06 LS-C6 discectomy and fusion
Right Knee Arthritis

STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:

Unable to return to work after 10-31-06 accident and subsequent surgery.

DATE
5-28-11

SIGNATURE OF PARTY OR ATTORNEY:

Stane Kelso

PRINT OR TYPE NAME:

Stane Kelso**CERTIFICATE OF SERVICE**

I hereby certify that on the 28 day of MARCH, 2011, I caused to be served a true and correct copy of the foregoing Complaint upon:

Manager, ISIF
Dept. of Administration PO Box 83720
Boise, Idaho 83720-7901

via: ☐ personal service of process
☒ regular U.S. Mail

Claimant's Name Kelli Sevy, 103 Elk Creek Rd
Kellogg, ID 83837
Address

via: ☐ personal service of process
☒ regular U.S. Mail

Employer's Name SVL Analytical, Inc.
P.O. Box 929, Kellogg, ID 83837
Address

via: ☐ personal service of process
☒ regular U.S. Mail

Surety's Name SIF, P.O. Box 83720, Boise, ID 83720-6044
H. James Magnuson P.O. 2288, Coeur d'Alene, ID
Address 83816

via: ☐ personal service of process
☒ regular U.S. Mail

☐ I have not served a copy of the Complaint upon anyone.

NOTICE:

Pursuant to the provisions of Idaho Code § 72-334, a notice of claim must first be filed with the Manager of ISIF not less than 60 days prior to the filing of a complaint against ISIF.

You must attach a copy of Form IC 1001 Workers' Compensation Complaint, to this document.

An Answer must be filed on Form IC 1003 within 21 days of service in order to avoid default.

ANSWER TO COMPLAINT**I.C. NO.: 06-526107****INJURY DATE: 10/31/2006**

Claimant's Name and Address: KELLI SEVY c/o STARR KELSO P.O. BOX 1312 COEUR D'ALENE, ID 83816	Claimant's Attorney's Name and Address: STARR KELSO P.O. BOX 1312 COEUR D'ALENE, ID 83816
Employer's Name and Address: SVL ANALYTICAL, INC. P.O. BOX 929 KELLOGG, ID 83837	Worker's Compensation Insurance Carrier's (Not Adjuster's) Name and Address: STATE INSURANCE FUND P.O. BOX 83720 BOISE, ID 83720-0044
Attorney Representing Employer or Employer/Surety (Name and Address) H. JAMES MAGNUSON P.O. BOX 2288 COEUR D'ALENE, ID 83816	Attorney Representing Industrial Special Indemnity Fund (Name and Address) THOMAS W. CALLERY JONES, BROWER & CALLERY P O BOX 854 LEWISTON ID 83501

_____ The above-named employer or employer/surety responds to Claimant's Complaint by stating:

FILED

X The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

11 74

IT IS: (Check One)**ADMITTED DENIED****INDUSTRIAL COMMISSION**

X		1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Worker's Compensation Act.
	X	4. That the condition for which benefits are claimed was caused partly _____ or entirely _____ by an accident arising out of and in the course of Claimant's employment
	N/A	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment
	Unknown to ISIF	6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
	N/A	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	Unknown to ISIF	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419:
X		9. That the alleged employer was insured or permissibly self insured under the Idaho worker's Compensation Act.
10. What Benefits, if any, do you concede are due Claimant?		
NONE FROM ISIF		

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

PLEASE SEE EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN
BY REFERENCE AS THOUGH SET FORTH IN FULL

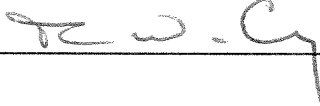
Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U. S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 111(D), Judicial Rules of Practice and Procedure under the Idaho Worker's Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C.1002.

I am interested in mediating this claim, if the other parties agree. ☐ Yes ☒ No

Do you believe this Claim presents a new question of law or a complicated set of facts? If so, please state.

No

Amount of Compensation Paid to Date

PPD	TTD	Medical	Dated	Signature of Defendant or Attorney
			5/19/11	

Please Complete

I hereby certify that on the 19th day of May, 2011, I caused to be served a true and correct copy of the foregoing Answer upon:

Claimant's Name and Address:

KELLI SEVY
c/o STARR KELSO
P.O. BOX 1312
COEUR D'ALENE, ID 83816

Employer and Surety's
Name and Address

H. JAMES MAGNUSON
P.O. BOX 2288
COEUR D'ALENE, ID 83816

Industrial Special Indemnity Fund
(If Applicable)

via: ☐ Personal Service of Process
☒ regular U. S. Mail

via: ☐ Personal Service of Process
☒ regular U. S. Mail

via: ☐ Personal Service of Process
☐ regular U. S. Mail



THOMAS W. CALLERY

EXHIBIT 'A'
AFFIRMATIVE DEFENSES

1. The Industrial Special Indemnity Fund recently received the Workers' Compensation Complaint against the Industrial Special Indemnity Fund and contemplates the initiation of formal discovery. The Fund has limited medical records available and is unable at this time to accurately either admit or deny portions of the Complaint and reserves the right to amend this Answer as necessary and warranted by subsequent discovery.
2. Claimant is not totally and permanently disabled.
3. Any permanent physical impairment suffered by the Claimant was not a hindrance or obstacle to Claimant's employment or re-employment.
4. If Claimant is totally disabled, it is not due to the aggravation and acceleration of a pre-existing condition nor due to the combined affects of pre and post injury conditions.
5. Claimant is capable of retraining for employment suitable to Claimant's alleged limitations but has either failed to pursue suitable employment or to cooperate in retraining for such employment.
6. The Defendant, Industrial Special Indemnity Fund, is without sufficient information to know whether Claimant has complied with applicable statutes of limitations and therefore alleges affirmatively that Claimant has not.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLI SEVY,

Claimant,

IC 2006-526107

v.

SVL ANALYTICAL, INC., Employer, and
IDAHO STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Surety,
Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Coeur d'Alene on February 15, 2012. Claimant was present in person and was represented by Starr Kelso. Employer and Surety were represented by James Magnuson. Industrial Special Indemnity Fund (ISIF) was represented by Thomas Callery. The parties presented oral and documentary evidence. Afterward, the parties submitted briefs. The case came under advisement on September 5, 2012. The case is now ready for decision.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to:
 - a. Permanent partial impairment (PPI); and
 - b. Permanent disability in excess of impairment, including total permanent disability;

4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
5. Whether ISIF is liable under Idaho Code § 72-332; and
6. Apportionment under the *Carey* formula.

At hearing, Defendants waived an issue about whether an accident occurred within the course and scope of employment.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant underwent a cervical fusion, unrelated to her employment, on May 15, 2006, before the accident in question.

Claimant contends she tripped over a dog at work and injured herself on October 21, 2006. The injury broke the fusion or prevented it from becoming permanent. A second surgery was required. As a result, Claimant is totally and permanently disabled, either by 100% analysis or by application of the odd-lot doctrine. Claimant's preexisting condition qualifies her for compensation through ISIF liability.

Employer and Surety contend Claimant is entitled to the costs of the second surgery and 2% PPI as rated by J. Craig Stevens, M.D. Surety has paid these. The second surgery merely accomplished what the first surgery—the nonindustrial surgery—intended. Claimant suffered no additional permanent restrictions, impairment or disability from the second surgery or from any other consequence of falling over the dog. Regardless of cause, Claimant is not totally and permanently disabled under any analysis.

ISIF contends it bears no liability under relevant statutes. Claimant is not totally and permanently disabled, nor is she shown to be an odd-lot worker. The work accident and subsequent second surgery did not produce any restrictions or disability in excess of those imposed by the first, nonindustrial, surgery.

FINDINGS AND CONCLUSIONS - 2

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The legal file of the Commission;
2. The hearing testimony of Claimant and of Claimant's vocational expert Dan Brownell;
3. Claimant's exhibits A through D;
4. Defendants' exhibits 1-21;
5. ISIF's exhibit 120; and
6. Post-hearing depositions of SkillTRAN designer Jeff Truthan, physical therapist Mark Bengston, vocational expert Nancy Collins, PhD, and neurosurgeon Jeffrey Larson, M.D.

Objections in depositions are all OVERRULED except as follows:

In Dr. Larson's deposition at page 40, the objection is SUSTAINED.

In Dr. Collins' deposition at page 6, the objection is SUSTAINED in part; those portions of her testimony were obtained by information from post-hearing depositions shall not be considered because they were generated untimely; at page 32 SUSTAINED as hearsay.

Having considered the evidence and arguments including all briefs, the Referee proffers the following findings of fact and conclusions of law for the Commission's consideration.

FINDINGS OF FACT

1. Claimant worked as a sample receiving technician. To do that job, Claimant was required, among other things, to occasionally lift soil samples weighing from 50 to 75 pounds. Although she performed well, she was officially underqualified for the job. Employer took steps to avoid contact between Claimant and quality inspectors.

2. Claimant underwent an anterior cervical fusion at C5-6 for a nonindustrial

FINDINGS AND CONCLUSIONS - 3

degenerative condition on May 15, 2006 (the "first surgery").

3. While she was healing from the first surgery on October 31, 2006, Claimant tripped over a dog at work and fell. She noticed renewed symptoms in and around her neck. Upon further examination, Jeffrey Larson, M.D., discovered her fusion had failed to fuse at the lower end. On January 19, 2007, he performed a second anterior cervical fusion and added a posterior fusion.

4. Claimant healed from the second surgery. She returned to work with modified duty. A co-worker helped her lift the heavy samples. Eventually, Claimant was indirectly informed that Employer had no more work within her restrictions.

5. Claimant separated from employment about October 12, 2007. She has not gainfully worked since, except for a period when she received compensation for caring for her two grandchildren.

Medical Care

6. Claimant's medical history reveals certain prior conditions which are not contributory to any disability analysis.

7. On September 14, 2004, Claimant underwent an L2 kyphoplasty for a compression fracture suffered in a scooter accident. Afterward, some cement extruded. It caused intermittent, chronic pain through the date of hearing.

8. On May 15, 2006, Dr. Larson performed the first surgery. His direct observation confirmed the presence of significant degeneration.

9. Dr. Larson noted normal recovery on follow-up visits.

10. On November 15, 2006, Dr. Larson noted Claimant's history of falling over the dog at work. Upon examination, he was concerned she may have a pseudoarthrosis of

her surgical fusion.

11. On January 19, 2007, Dr. Larson performed the second surgery.

12. Dr. Larson noted gradual recovery in follow-up visits.

13. On March 16, 2007, ICRD consultant Susan Shiplett prepared a job site evaluation ("JSE").

14. On April 24, 2007, Dr. Larson allowed her to return to modified duty, with lifting restrictions for her back condition. He state he did not "think" she was disabled because of her neck.

15. On June 5, 2007, Claimant reported to Dr. Larson that she was back at work and doing fine with lifting assistance from a co-worker. She reported increasing pain in the past two weeks after a bicycle accident and a fall while fishing.

16. On July 10, 2007, Dr. Larson deemed Claimant at maximum medical improvement ("MMI") for her neck. He stated, "Any further treatment of her C-spine from this point will more than likely relate to her pre-existing condition." He referred Claimant for a functional capacity evaluation ("FCE").

17. On August 7, 2007, Dr. Larson reviewed the FCE, examined Claimant, and reiterated she was at MMI for her neck.

18. On October 3, 2007, J. Craig Stevens, M.D., evaluated Claimant and her medical records at Surety's request. He found Claimant's neck condition to be at MMI. He opined her cervical condition should be rated at 12% with 10% pertaining to the degenerative condition and first surgery, with 2% pertaining to the industrially related second surgery. He opined she suffered no permanent work restrictions as a result of the second surgery. He opined she could return to her job as described on the March 16 JSE.

Restrictions identified by the Bengston FCE relate to her low back. Dr. Stevens did not address her low back or other potential preexisting impairments.

19. On March 9, 2009, Dr. Larson wrote Surety to opine that Claimant had no work restrictions related to her neck condition. Whatever her cervical condition, it is causally related to the degenerative condition for which the first surgery was performed. The second surgery did not contribute to any permanent condition. He agreed with Dr. Stevens' report concerning causation, but not concerning PPI. Dr. Larson did not opine about how or whether he would rate PPI.

20. An August 11, 2009 MRI showed a C4-5 disc protrusion with stenosis. Claimant reported symptoms consistent with this finding. Dr. Larson recommended surgery.

21. On August 21, 2009, Dr. Larson performed an anterior cervical fusion at C4-5 and removed a plate at C5-6. He responded to Surety's correspondence and checked "No" when asked whether this surgery was causally related to the industrial accident.

22. Usual follow-up visits occurred, including a visit where Dr. Larson noted conversing with Claimant about his causation opinion.

23. On April 10, 2010, Dr. Larson examined Claimant and took X-rays and reviewed an MRI taken March 17, 2010. He found no changes in the various levels of her back which are of concern. He considered these "stable." He noted she reported continuing neck and back pain.

Right knee

24. On August 28, 2006, John McNulty, M.D., reported that an MRI of Claimant's right knee was unremarkable. From the end of 2006 to 2010, she required no

right knee treatment.

25. On August 2, 2010, another MRI showed a tear of the horn of the lateral meniscus.

26. On August 11, 2010, Dr. McNulty performed arthroscopic surgery.

27. Dr. McNulty's last follow-up visit is dated August 25, 2010.

Expert medical opinions

28. Neurosurgeon Jeffrey Larson, M.D., treated Claimant. He performed an anterior cervical fusion at C5-6 on May 15, 2006. Generally, a 12-week recovery period is expected with a typical variance of 6 to 16 weeks of recovery. At that point, resumption of activities is recommended. The bones may continue to heal and the union to fuse for as much as one year, sometimes up to two.

29. Dr. Larson performed a revision of this surgery on January 19, 2007, because the bones failed to fuse resulting in a pseudarthrosis. This second surgery included a posterior interspinous wiring to better ensure a solid fusion.

30. Claimant reported an amelioration of her neck and arm pain after the second surgery. By February 28, 2007, Dr. Larson considered her "likely to be able to return to her job where she sometimes has to lift up to a hundred pounds." At the next visit, on April 24, 2007, Claimant reported a lingering "heavy" feeling in her neck and muscle spasms and "difficulty lifting heavy objects" all of which she felt left her unable to return to work. She also reported low back pain and a right knee problem, both of which were preexisting and unrelated to her work. Upon examination, including X-rays, Dr. Larson opined, "I do not think she's disabled because of her neck." He did consider it "unreasonable to expect her to lift 70 pounds" as of April 24, 2007. Dr. Larson did

consider modified duty of a 20-40 pound lifting restriction to be appropriate. Later, Claimant reported to Dr. Larson she had successfully returned to work and a co-worker helped her lift heavy samples.

31. On June 5, 2007, Claimant returned to Dr. Larson. She complained of increasing neck and arm pain associated with bike riding. She also reported falling in a sinkhole while fishing. A repeat MRI taken June 23, 2007 showed "a disc bulge at C4-5 that may have increased slightly since the MRI on March 24, 2006." At a July 10, 2007 visit, Dr. Larson deemed her to be at MMI from the second surgery and ordered an FCE. He formally opined in writing on August 6, 2007, that Claimant was at MMI.

32. Dr. Larson agreed with the findings of Mark Bengston's FCE report. He specifically agreed with Bengston's opinion that Claimant should not return to her prior job. The functional limitations indicated by the FCE were related to preexisting thoracic and lumbar spine conditions.

33. Dr. Larson opined the nonunion and second surgery likely resulted from the industrial accident in which Claimant fell over the dog.

34. Dr. Larson opined the original surgery likely was caused by "a natural progression of a degenerative disc or wear and tear."

35. Dr. Larson opined the second surgery did not result in new limitations or restrictions. The second surgery caused no PPI.

36. Dr. Larson opined that Claimant's low back condition involving the extravasation of cement from her L2 surgery in September 2004 needs nonsurgical treatment and is not ripe for a PPI rating.

37. Dr. Larson opined that an additional cervical fusion performed on August 21,

2009, at C4-5—the level above the 2006 and 2007 fusion surgeries—was not related to the industrial accident.

Other conditions

38. Claimant's medical records identify other nonindustrial conditions not discussed above. No permanent impairment has been rated for these. Findings about these conditions are not relevant to assigning or apportioning permanent disability.

Vocational Factors

39. Born [REDACTED], Claimant was 48 years old at the date of hearing.

40. Claimant did not graduate from high school and has been unable, despite two attempts and extensive training, to obtain a GED.

41. In addition to her job as a soil sample technician, Claimant has worked in food service, as a casino blackjack dealer, as a gas station attendant, and as a child care provider.

42. Claimant makes a good first impression. At hearing, she appeared to be minimizing her physical reactions to pain and discomfort. Her increase in emotional and physical behaviors while testifying about tripping over the dog and requiring a second surgery appeared modest and genuine.

Vocational experts

43. Registered physical therapist Mark Bengston performed an FCE of Claimant on August 1, 2007 upon referral from Dr. Larson. Mr. Bengston opined Claimant gave maximal effort on testing and that she was able to perform light work and some tasks slightly above the light work category. Mr. Bengston opined some of Claimant's functional limitations were obviously related to her lumbar condition. He did not opine

that any of her functional limitations were likely related to her cervical condition. He did note that she reported some discomfort in her cervical spine upon testing.

44. ICRD consultant Susan Shiplett performed a job site evaluation ("JSE") on March 16, 2007. Based upon the data included, Dr. Larson approved Claimant's return to her prior position as sample receiving technician.

45. Nancy Collins, Ph.D., evaluated Claimant's permanent disability at Employer's and Surety's request. Dr. Collins did not interview Claimant. She observed Claimant during Claimant's prehearing deposition and reviewed medical and vocational records and reports. She analyzed Claimant's vocational potential using SkillTRAN. She opined that Claimant is capable of sedentary, light work and some work above the light category but cannot perform work categorized fully as medium. The Kellogg labor market is poor to fair, but some jobs are regularly available within Claimant's restrictions. If the Coeur d'Alene labor market is considered Claimant's job prospects improve considerably. Dr. Collins was not asked to opine about a permanent disability rating for Claimant.

46. Dan Brownell analyzed Claimant's disability at Claimant's request. He performed a SkillTRAN analysis. He obtained assistance from SkillTRAN developer Jeff Truthan. In his report, without providing a specific numerical permanent disability rating, Mr. Brownell opined Claimant's labor market access rendered her an odd-lot worker.

DISCUSSION AND FURTHER FINDINGS OF FACT

47. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for

narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

48. Claimant is credible. Her demeanor and testimony were consistent with other evidence of record.

PPI and Permanent Disability

49. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

50. Dr. Stevens opined Claimant's second surgery should be rated at 2% PPI. He found no ratable decrease in cervical range of motion and no relatable work restrictions. While it is unusual that PPI can be found absent these factors, this case is an example of how it can happen.

51. A surgical fusion changes the natural structure of the spine. A cage or other appliances placed in a body result in a permanent change in its structure. Even if the overall result is to improve function, such implantation of appliances, along with the natural scarring that must result from surgery, impairs the function of the body part affected. In this case, Claimant's C4-5 joint can no longer function.

52. Although no physician expressly opined about the specific factors involved, Dr. Stevens' PPI rating for the first surgery is deemed to reflect the implantation of

appliances and the scarring that resulted from surgery. His rating for the second surgery is deemed to reflect the additional posterior appliance implantation and additional scarring.

53. Claimant's PPI should be rated at 2% of the whole person related to the industrial accident.

54. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

55. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

56. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425, *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is

upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

57. Claimant's argument for permanent disability is problematic. Claimant attempts to create ambiguity in the wording of the Bengston FCE and Mr. Bengston's testimony in order to claim she suffered work restrictions as a result of the second surgery. To the contrary, the Bengston FCE and his testimony are not reasonably ambiguous. Dr. Larson, who agrees entirely with Mr. Bengston's FCE, does not find Mr. Bengston to be ambiguous. Dr. Larson opined that neither the first surgery nor the second surgery likely caused any work restrictions. Dr. Stevens agreed. The weight of evidence supports a finding that the work restrictions identified by Mr. Bengston relate entirely to Claimant's low back condition; they do not relate to her C-spine condition; they do not relate to the industrial accident, second surgery and/or recovery period after the second surgery.

58. The evidentiary weight assignable to Mr. Brownell's disability analysis is undercut by three factors: His stated general disdain for those with education, specifically his stated preference for physical therapists' opinions over those of medical doctors; his association with Mr. Truthan who designed SkillTRAN in deciding what inputs to choose; and Mr. Brownell's unprofessional demeanor at hearing. Upon a reasonable cross-examination by ISIF's attorney, Mr. Brownell took umbrage and overreacted to the extent that he left the witness stand and crossed the well to confront ISIF's attorney in an apparent attempt to intimidate. The Commission and this Referee respect Mr. Brownell's character and expertise in helping claimants find jobs when he worked as an ICRD consultant. We recognize he is just starting out in his new role as an independent forensic vocational consultant. It is hoped he will successfully navigate this transition.

59. Dr. Collins' analysis of the percentage of sedentary and light jobs available

to Claimant in the Kellogg labor market carries persuasive weight.

60. Consideration of all medical and nonmedical factors does not establish a basis upon which to award permanent disability in excess of PPI as a result of the industrial accident. Claimant failed to show by medical opinion a likely basis for an award of permanent disability in excess of PPI.

61. Under a *Page* analysis, Claimant's FCE limitations suggest PPI likely would have been appropriate following Claimant's lumbar surgery in 2004. Assuming in the absence of specific evidence of record and relying upon the general expertise of the Commission, that the lumbar surgery would have resulted in a PPI rating of 10% of the whole person and considering all medical and nonmedical factors, Claimant's permanent disability rating may have been as much as 45% inclusive of the PPI from the lumbar surgery and first and second neck surgeries. When the industrially unrelated components are apportioned as set forth by Idaho Code § 72-406, all permanent disability is preexisting except for the 2% PPI which is industrially related.

62. Claimant should be entitled to permanent disability rated 2% of the whole person, which amount is wholly included in the PPI rating. Claimant is not 100% totally and permanently disabled.

63. **Odd lot.** If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he or she is to be considered totally and permanently disabled. *Boley, supra*. Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). *Taken from, Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has

attempted other types of employment without success, by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

64. Claimant returned to work for a short time after the second surgery. Recognizing the FCE work restrictions, a co-worker assisted her with lifting heavy samples. While laudable that Claimant is and has been a hard worker, those work restrictions were identified and related to her low back injury in 2004. Thus, her separation from Employer was unrelated to the industrial accident.

65. Claimant has tended her two grandchildren for compensation. Factors unrelated to her second surgery caused the compensation to cease, even if her work to provide such care did not.

66. The evidence shows Claimant fails to qualify as an odd-lot worker under the first prong of the test; she has successfully obtained and performed work after recovering from the industrial accident. Under the second prong of the test Claimant failed to produce a preponderance of evidence to show she or others attempted unsuccessfully to find work for her. Under the third prong of the test Dr. Collins showed it likely that even in the smaller and poorer Kellogg labor market, sedentary and light-duty jobs are regularly available and therefore, a job search would not be futile.

ISIF Liability and *Carey* Formula

67. Claimant is neither 100% totally and permanently disabled, nor does she qualify as an odd-lot worker. ISIF incurs no liability and therefore apportionment under *Carey* is moot.

CONCLUSIONS

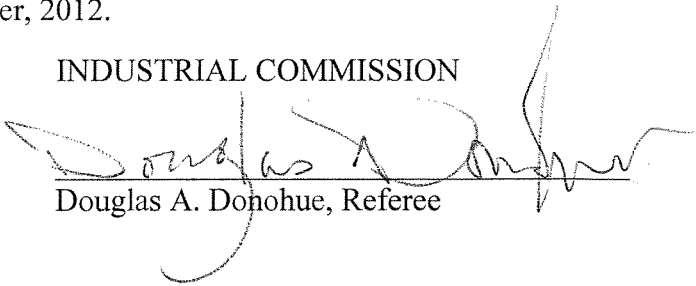
1. Claimant suffered PPI rated at 2% of the whole person as a result of the industrial accident and second surgery;
2. Claimant suffered permanent disability from all causes rated at 45% of the whole person inclusive of PPI, of which 43% should be apportioned as preexisting under Idaho Code § 72-406;
3. Claimant is not 100% totally and permanently disabled;
4. Claimant failed to show it likely she qualified as an odd-lot worker;
5. ISIF bears no liability under Idaho Code §72-332; and
6. The issue of *Carey* formula apportionment is moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 17th day of December, 2012.

INDUSTRIAL COMMISSION


Douglas A. Donohue, Referee

ATTEST:

Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

INDUSTRIAL COMMISSION

KELLI SEVY,

Claimant,

IC 2006-526107

v.

SVL ANALYTICAL, INC., Employer, and
IDAHO STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Surety,
Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Coeur d'Alene on February 15, 2012. Claimant was present in person and was represented by Starr Kelso. Employer and Surety were represented by James Magnuson. Industrial Special Indemnity Fund (ISIF) was represented by Thomas Callery. The parties presented oral and documentary evidence. Afterward, the parties submitted briefs. The case came under advisement on September 5, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to:

- a. Permanent partial impairment (PPI); and
 - b. Permanent disability in excess of impairment, including total permanent disability;
4. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine;
5. Whether ISIF is liable under Idaho Code § 72-332; and
6. Apportionment under the *Carey* formula.

At hearing, Defendants waived an issue about whether an accident occurred within the course and scope of employment.

CONTENTIONS OF THE PARTIES

The parties agree that Claimant underwent a cervical fusion, unrelated to her employment, on May 15, 2006, before the accident in question.

Claimant contends that on or about October 31, 2006, she suffered a work-related accident when she tripped over a dog at her workplace. She contends that as a consequence of the subject accident she re-injured her neck such as to require surgical revision of her non-work related C5-6 fusion. Claimant contends that she is totally and permanently disabled as of the date of hearing, and that her total and permanent disability results from the combined effects of the subject accident and certain pre-existing physical impairments, including, inter alia, T12 and L2 compression, cervical spine disease at C4-5 and cervical spine fusion at C5-6. Claimant contends that all elements of ISIF liability have been met for some or all of these pre-existing conditions.

Employer/Surety acknowledges the occurrence of the accident of October 31, 2006, and further acknowledges that as a consequence of the subject accident, Claimant required a “re-do” fusion at the C5-6 fusion site. Employer/Surety acknowledges responsibility for the payment of time-loss and medical expenses associated with the fusion revision

performed by Dr. Larson on or about January 19, 2007. Employer/Surety acknowledges that while Dr. Larson has not seen fit to give Claimant an impairment rating for the effects of the subject accident, Dr. Stevens, to whom Employer/Surety referred Claimant for an Idaho Code § 72-433 exam, has given Claimant a 2% PPI rating for that accident. However, Employer/Surety denies that Claimant has suffered any additional disability as a consequence of the accident or related surgery. Instead, Employer/Surety contends that, to the extent Claimant suffers current disability as a consequence of her cervical spine condition, that disability is entirely referable to Claimant's underlying cervical spine condition, a condition which was not permanently aggravated by the accident of October 31, 2006.

The ISIF contends that Claimant has not met her burden of establishing, as a necessary prerequisite to ISIF liability, that she is totally and permanently disabled. Further, the ISIF argues that the accident of October 31, 2006 did not result in any additional limitations/restrictions related to Claimant's cervical spine. Therefore, Claimant cannot meet her burden of demonstrating that the subject accident combined with the effects of Claimant's documented pre-existing conditions to cause total and permanent disability. Specifically, the ISIF contends that the subject accident caused, at most, a temporary exacerbation of Claimant's pre-existing cervical spine disease, and as of the date of hearing the subject accident was no longer implicated in either causing or contributing to Claimant's cervical spine dysfunction.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. The legal file of the Commission;
2. The hearing testimony of Claimant and of Claimant's vocational

FINDINGS, CONCLUSIONS, AND ORDER - 3

- expert Dan Brownell;
3. Claimant's exhibits A through D;
 4. Defendants' exhibits 1-21;
 5. ISIF's exhibit 120; and
 6. Post-hearing depositions of SkillTRAN designer Jeff Truthan, physical therapist Mark Bengston, vocational expert Nancy Collins, PhD, and neurosurgeon Jeffrey Larson, M.D.

Objections in depositions are all OVERRULED except as follows:

In Dr. Larson's deposition at page 40, the objection is SUSTAINED.

In Dr. Collins' deposition at page 6, the objection is SUSTAINED in part; those portions of her testimony were obtained by information from post-hearing depositions shall not be considered because they were generated untimely; at page 32 SUSTAINED as hearsay.

FINDINGS OF FACT

Educational/Vocational Background

1. Claimant was [REDACTED] on [REDACTED]. As of the date of hearing, she was 49 years of age. She resided at 103 Elk Creek Road, a rural address in Idaho's Silver Valley.

2. Claimant suffered a traumatic childhood. She dropped out of school just before high school graduation because she did not have sufficient credits to graduate. Since then, she unsuccessfully pursued a GED, her deficient math skills proving to be the most significant obstacle. She has pursued no other significant education or training.

3. Before dropping out of high school, Claimant worked for two summers as an attendant at a gas station located on Lake Powell. She had limited cashiering responsibilities. After leaving high school, Claimant worked as a food server/dishwasher at a restaurant in Ticaboo, Utah.

4. In approximately 1987, Claimant and her husband moved to Winnemucca, Nevada. The couple lived there until approximately 1998 or 1999. While living in Winnemucca, Claimant worked on three separate occasions for the Winners Casino in Winnemucca. She was initially hired to sell change to Casino customers. Thereafter, she was trained to be a blackjack dealer. Though she was evidently successful as a blackjack dealer, she testified that her poor math skills hampered her to some degree in this job. In addition to dealing blackjack, Claimant also dealt craps and roulette. However, due to deficiencies in math skills, she was only allowed to deal outside the pass line on the craps table.

5. In approximately 1998 or 1999, Claimant and her husband moved to Idaho's Silver Valley, where they took up residence at the Elk Creek address. She worked as a homemaker for a few years before obtaining employment at SVL Analytical (SVL) in approximately 2004. At SVL, Claimant was initially employed in the bucking room, where she worked for approximately nine months. Thereafter, she was assigned to shipping and receiving. She testified that she also spent a little time working in the soil digestion lab, and filtering samples. Shortly before the October 31, 2006 accident, Claimant was being trained to input sample information into the computer.

6. Since leaving SVL Claimant briefly worked as a housekeeper. Her only other employment since the subject accident has been as a caretaker for her daughter's three children under the auspices of the Idaho Child Care Program (ICCP).

Pre-Injury Medical History

7. Claimant injured her left shoulder in an automobile mishap occurring when she was 17 years of age. She testified that over time she has developed progressive

arthritic changes in the shoulder. Recently, she underwent a left shoulder injection performed by Dr. Larson. She testified that this injection helped a great deal with the shoulder locking she had been experiencing.

8. In approximately 2000, Claimant suffered a T12 compression fracture as the result of a sledding mishap. As of the date of hearing, she testified that this injury troubled her to some extent; at the end of a busy day she experiences muscle spasms and tightness in her back that she associates with this injury.

9. In August of 2004, Claimant suffered a back injury when she fell from the scooter that she had given to her son for his birthday. For this injury she was evaluated by Glenn Keiper, M.D. Claimant was diagnosed as suffering from an L2 compression fracture. In discussing treatment options with Dr. Keiper, Claimant decided upon proceeding with a repair of the fracture with kyphoplasty, in the hope that this would resolve her discomfort and allow her to return to work more quickly. This procedure was performed on September 14, 2004. It involved injecting a cement into the vertebral body to stabilize the fracture. The procedure did not resolve Claimant's discomfort. Subsequent workup by Dr. Keiper suggested that an L4-5 disc bulge might be implicated in causing Claimant's symptoms. A series of epidural steroid injections were performed by Dr. Magnuson, which provided only temporary relief. When Dr. Keiper left town, Claimant's orthopedic care was assumed by Jeffrey Larson, M.D. Dr. Larson ordered a repeat MRI evaluation of Claimant's lumbar spine. That study, performed on April 19, 2005, demonstrated additional prolapse of Claimant's L4-5 disc space. In addition, the study revealed a small amount of extruded cement at the L2 vertebral body. This extrusion extended into the thecal sac. Dr. Larson posited that this finding could contribute to

Claimant's pain/discomfort. At the time of hearing, Claimant described her low back symptomatology as "huge chronic pain". (Transcript 94/12-95/18). She described constant pain down her legs bilaterally and being unable to stand up straight. These symptoms had a significant impact on her ability to perform her work at SVL:

Q. Did being in the fixed forward manner when you walked and -
- did that impact your ability to lift, carry, do anything like that?

A. It did, yes.

Q. How?

A. Well, I couldn't - - I couldn't pick up buckets and stuff like I, you know once could just pick it up no problem and throw it on a cart. But after the surgery, I would have to slide it and then kind of use my feet or my knees to help me lift it up to the cart, which is only about five or six inches up off the ground. If I could get one corner of the bucket onto the cart, then I could slide it, get the rest of it up on there too.

Q. So you modified your position. Instead of picking the bucket up, you'd slide it, use your feet, pick it up - -

A. Yes.

Q. - - with your foot?

A. Yes. Or if somebody was around, then I would just, you know - they would come over and help me lift buckets."

Tr. 94/22-95/18.

10. Claimant was seen by Dr. Larson on May 2, 2006 for evaluation of cervical spine pain from which she had been suffering for about a year as of May 2nd. As of the date of her May 2nd evaluation, Claimant presented with complaints of severe neck pain accompanied by left shoulder numbness and tingling as well as difficulty with holding up her right arm. She also complained of intermittent bilateral hand tingling as well. MRI evaluation of Claimant's cervical spine performed on March 24, 2006 demonstrated a broad-based disc bulge at C4-5 that effaced the thecal sac, but did not cause significant spinal stenosis. At C5-6, Claimant was found to have severe degenerative disc disease with mild spinal stenosis with effacement of the left lateral recess. The study demonstrated

moderate left and mild right foraminal narrowing at C5-6. Modic changes were noted at the C5 vertebral body, as well as in the C6 vertebral body, consistent with the degenerative disc disease. Dr. Larson recommended Claimant for an anterior cervical discectomy and fusion at C5-6, hoping that this would alleviate her neck and upper extremity symptoms.

11. Claimant underwent an anterior cervical discectomy and fusion at C5-6 on May 15, 2006. By June 2, 2006, Dr. Larson reported that Claimant suffered a slip and fall approximately eight days after her surgery. She complained of worsening symptoms thereafter, including a burning type sensation along the lateral aspect of her left forearm. By July 6, 2006, Dr. Larson reported that Claimant was doing well. She denied significant neck pain and did not note any radicular type symptoms. On July 6, 2006, Claimant was encouraged to be active and continue with her home exercise program. She was instructed to refrain from repetitive overhead lifting, and advised that her maximal lifting should be at thirty pounds. She was to be seen in three months for a follow-up evaluation.

12. Claimant testified that following the May 15, 2006 surgery, she was eventually returned to work with restrictions against lifting more than 20 to 40 pounds. (Transcript 97/10-13; 98/13-18). When she returned to SVL following the first neck surgery, she did not return to the bucking room. Rather, she returned to work in the shipping and receiving department. (Transcript 100/12-106/20). Claimant's testimony establishes that the work she performed for Employer following the May 15, 2006 surgery, but before the October 31, 2006 accident, was physically less demanding than the job she had performed prior to the May 15, 2006 surgery. She was able to perform this lighter work by employing various strategies to modify the physical requirements of her work, and by seeking the assistance of others. For example, Claimant's husband made for her a stick

with a hook on the end that Claimant employed to drag, instead of lift, sample containers. (Tr. 98/19-100/11).

Accident and Post-Accident Medical Care

13. Claimant's Employer suffered employees to bring their dogs to work. On October 31, 2006, Claimant tripped over a co-worker's dog that was always underfoot. (Transcript 106/25-108/3). The medical record does not reflect whether, as of October 31, 2006, Dr. Larson had pronounced Claimant to be at a point of medical stability following the May 15, 2006 surgery.

14. Claimant returned to Dr. Larson's office on or about November 15, 2006. Dr. Larson's note of that date describes the October 31, 2006 accident, and reflects that of November 15, 2006, Claimant complained of continuous pain in her neck with any movement of her neck. Dr. Larson was concerned that Claimant might have suffered a fracture at the fusion site, and ordered MRI and CT evaluation of Claimant's cervical spine. The MRI, performed on December 5, 2006, demonstrated no change in Claimant's C4-5 disc bulge, as compared to the earlier study. A December 5, 2006 CT scan of Claimant's cervical spine showed a lucency along the inferior aspect of the C5-6 bone graft, suggestive of a fractured fusion. Dr. Larson recommended a revision of the C5-6 fusion. That surgery was performed on January 19, 2007. By February 28, 2007, Claimant reported significant improvement in her pre-surgery arm pain. She expressed an interest in returning to work. However, when seen by Dr. Larson on April 24, 2007, she described having difficulty lifting heavy objects, and expressed concern that she would not be able to perform her job because of this. Dr. Larson also noted Claimant's ongoing low back problems related to the L2 kyphoplasty, as well as a right knee problem for which she was

being treated by Dr. McNulty. In this regard, he noted that Claimant had been taking hydrocodone for at least a year prior to the January 19, 2007 neck surgery. Dr. Larson noted that this medication had been prescribed for Claimant by Dr. Miller for her low back and her knee. On exam, Claimant complained of low back pain and told Dr. Larson that she would like to go on disability "for her spine". Dr. Larson stated that he did not believe Claimant to be disabled because of her cervical spine, noting that the fusion appeared to be healing well. He stated that while it might not be reasonable to ask Claimant to lift 70 pounds as of April 24, 2007, she should be able to return to modified duty work in terms of her cervical spine, so long as she avoided lifting more than 40 pounds.

15. Claimant was next seen by Dr. Larson on June 5, 2007. In his note of that date he reported that Claimant returned to work following the April 24, 2007 exam, stating that she had been doing fine. Claimant told Dr. Larson that she had the assistance of a co-worker to help her lift heavy buckets of soil. However, Claimant also told Dr. Larson that about two weeks prior to June 5, 2007, she had begun to experience increasing pain in her neck and arms while riding her mountain bike. Then, a few days prior to the June 5, 2007 evaluation, she fell into a "sink hole" while fishing. She told Dr. Larson that she felt and heard a ping in her neck contemporaneous with her fall, and that since that time she had increased pain in her neck, shoulders and arms, bilaterally. Dr. Larson recommended repeat MRI evaluation of Claimant's cervical spine. In the interim, he released Claimant to return to work with an eight pound lifting restriction, a restriction that Employer was unable to accommodate. The MRI of June 23, 2007, showed a healed fusion at C5-6, but a possible increase in the size of the C4-5 disc bulge, as compared to the previous MRI of March 24, 2006.

16. Dr. Larson felt that Claimant had probably reached maximum medical improvement as of July 10, 2007. He recommended that Claimant undergo a functional capacity evaluation to determine whether Claimant had any permanent work restrictions. Importantly, he noted on that date that "any further treatment of her C spine from this point will more than likely relate to her pre-existing condition. Elaborating on this point in his March 9, 2009 letter to the State Insurance Fund, Dr. Larson stated:

Ms. Sevy does not have any work restriction related to her neck condition.

She has a history of having an anterior cervical discectomy and fusion at C5-6 on 5/15/2006. She then fell at work and had developed pseudoarthrosis at that level, and had surgery for pseudoarthrosis on January 19, 2007. Any restrictions that she may have, and I don't think there are any related to her neck, would relate to the previous condition for which she had surgery done on May 15, 2006. The second surgery was a supplemental fusion at that same level and would not add any restrictions.

D. Ex. 1, p.9.

Dr. Larson reiterated his opinion in this regard at the time of his April 23, 2012 deposition:

Q.(by Magnuson) Now, focusing on the C5-6 issue, was there any limitations or restrictions that arose out of when she tripped over the dog at work?

A. What do you mean?

Q. Would there be any limitations or restrictions that would be - - I guess were there any limitations or restrictions to her - - from her C5-6 fusion?

A. I'll have to look and see. It was my opinion that she had been at MMI. I don't know if I did her - - I don't remember if anyone else did. I don't think there are any new limitations to her based on the pseudoarthrosis that I treated.

Q. Okay. So if she had any limitations or restrictions related to her cervical condition, those would be related to the degenerative condition you treated in May of 2006; is that correct?

A. If they were at C5-6, yes.

Q. Okay. So there were no new limitations, restrictions just because of the fusion redo?

A. No.

Larson deposition 25/23-26/18.

17. Concerning Claimant's ratable impairment for the effects of the October 31, 2006 accident, Dr. Larson did not feel that Claimant was entitled to any additional impairment for that accident, or for the fusion revision required as a consequence of that accident. (Larson deposition 26/19-23).

18. Dr. Larson did not express an opinion on the extent and degree of Claimant's permanent physical impairment for her pre-existing cervical spine condition. Concerning Claimant's low back condition, Dr. Larson did not feel it appropriate to rate Claimant as of the time of his deposition, since he felt that Claimant was not medically stable *vis-à-vis* her L2 kyphoplasty.

19. Craig Stevens, M.D., saw Claimant on October 3, 2007, at the instance of the State Insurance Fund. Dr. Stevens' report reflects that as of the date of his evaluation of Claimant, she had no complaints of neck pain, although she did indicate that she experienced neck pain with overhead work, or while performing lifting. As of the date of his evaluation of Claimant she did have complaints of baseline low back pain, which she rated on a level 4 out of 10, with extension of discomfort into her lower extremities bilaterally. After examining Claimant and reviewing her records, Dr. Stevens proposed that Claimant was at maximum medical improvement *vis-à-vis* her cervical spine condition. He gave Claimant a 12% PPI rating under the Fifth Edition to AMA Guides to the Evaluation of Permanent Impairment. This rating he apportioned between the effects of the subject accident and Claimant's pre-existing cervical spine condition, assigning Claimant a 2% PPI rating for the subject accident and 10% for her pre-existing condition.

20. Concerning Claimant's permanent limitations/restrictions, Dr. Stevens shared

Dr. Larson's belief that the subject accident did not result in any increase in Claimant's limitations/restrictions. In fact, Dr. Stevens was of the view that Claimant's cervical spine condition did not warrant the imposition of any permanent limitations/restrictions. While he acknowledged that the FCE administered by Mark Bengston identified certain limitations/restrictions, Dr. Stevens felt that those limitations are referable in their entirety to Claimant's non work-related thoracic and lumbar spine injuries.

21. Mark Bengston saw Claimant for the purposes of a functional capacities evaluation (FCE) in August 2007. Mr. Bengston testified that the focus of the FCE was to identify limitations/restrictions referable to Claimant's cervical spine condition. However, he acknowledged that the evaluation also identified limitations/restrictions referable to Claimant's thoracic and lumbar spine. Contrary to Dr. Steven's conclusions, Mr. Bengston felt that Claimant demonstrated limitations/restrictions referable to her cervical, thoracic and lumbar spine. Per Mr. Bengston, Claimant's cervical spine condition limits her ability to engage in overhead reaching activities. However, he acknowledged that some of Claimant's upper extremity difficulty may be attributable to her thoracic spine injury. Most of Claimant's restrictions against lifting, carrying, pushing and pulling are referable to her thoracic and lumbar spine injuries. Limitations against stair climbing and walking are referable to Claimant's bilateral knee injuries. Although Mr. Bengston clearly identified certain limitations/restrictions which he felt were referable to Claimant's cervical spine condition, he did not render an opinion on the extent, if any, to which Claimant's cervical spine limitations/restrictions are referable to the October 31, 2006 accident versus Claimant's documented pre-existing cervical spine condition. In all, Mr. Bengston proposed that Claimant is capable of performing all aspects of sedentary and light duty

work, and some aspects of medium duty work as defined in the *Dictionary of Occupational Titles*.

22. Although both Dr. Larson and Dr. Stevens have proposed that Claimant has no permanent limitations/restrictions referable to the October 31, 2006 accident, Claimant testified that following the May 15, 2006 surgery, she enjoyed a good recovery and a recovery of function until the October 31, 2006 accident. Per Claimant, that accident caused a recurrence of her symptomatology which was not relieved by the January 19, 2007 surgery. (Transcript 124/22-127/25).

23. In 2009, Claimant underwent surgical treatment for her C4-5 disc bulge. The parties are in agreement that Claimant's C4-5 lesion and attendant surgery are unrelated to the subject accident.

Vocational Evidence

24. As noted, the results of the FCE administered by Mark Bengston suggest that Claimant has permanent limitations/restrictions referable to her cervical, thoracic and lumbar spine conditions, as well as her bilateral knee injuries. From the results of the FCE, it appears that the most significant limitation/restriction referable to Claimant's cervical spine injury is the recommendation that she avoid overhead reaching activities.

25. The Commission recognizes that Dr. Larson has proposed that the limitations/restrictions identified by Mr. Bengston derive from Claimant's thoracic and lumbar spine injuries, without contribution from her cervical spine condition. To the extent Dr. Larson's views conflict with the FCE results as explained by Mr. Bengston, the Commission finds Mr. Bengston's testimony to be more persuasive. As noted, however, though Mr. Bengston did feel that Claimant had certain functional limitations attributable

to her cervical spine condition, he did not hazard a guess as to whether those cervical spine limitations were in any way referable to the subject accident, versus Claimant's well-documented pre-existing cervical spine condition.

26. Nancy Collins, PhD. evaluated Claimant's permanent disability at the invitation of Employer/Surety. She did not have the opportunity to interview Claimant, although she did attend Claimant's depositions. Dr. Collins acknowledged that the Kellogg labor market is poor to fair, but nevertheless opined that there are some jobs in Claimant's labor market for which she can compete. Dr. Collins based this opinion on the results of the FCE, which indicated that Claimant is physically capable of performing all aspects of light and sedentary work, and some aspects of medium duty work. Dr. Collins did not feel that Claimant is totally and permanently disabled, but neither did she render an opinion on the extent and degree of Claimant's less-than total disability. She did propose that if one assumes that Claimant is only capable of performing sedentary and light duty work, she has lost access to approximately 35% of her pre-injury labor market. Dr. Collins felt that Claimant's pre-injury labor market reasonably included the Coeur d'Alene area. She acknowledged that if Claimant is unable to engage in overhead-reaching activities then her access to the labor market is more limited. However, she was critical of Mr. Brownell for having subtracted from Claimant's post-accident labor market jobs that required reaching of any type.

27. Mr. Brownell, like Dr. Collins, employed SkillTRAN software to assist him in evaluating Claimant's disability. He testified that this program is merely one of several tools he utilizes in evaluating the impact of an industrial accident on an injured worker's ability to engage in gainful activity. He proposed that when taking into consideration

Claimant's age, education, past work history and transferable job skills, the limitations/restrictions identified following the FCE leave Claimant totally and permanently disabled. Mr. Brownell was critical of Dr. Collins use of the SkillTRAN program, and testified that the assumptions made by Dr. Collins when making inputs into the program resulted in a dramatic understatement of Claimant's loss of access to the labor market. In particular, Mr. Brownell felt that Dr. Collins failed to take into account Claimant's limitations/restrictions against reaching with her upper extremities. Mr. Brownell did not feel it appropriate to include the Coeur d'Alene area in Claimant's reasonable labor market. Mr. Brownell opined that as a result of the combined effects of the October 31, 2006 accident, and Claimant's pre-existing conditions, Claimant was totally and permanently disabled under the odd-lot doctrine. (See Claimant's Exhibit A at 5). In reaching this conclusion, Mr. Brownell acknowledged that he relied only on the results of the functional capacities evaluation; he was aware that both Drs. Larson and Stevens did not feel that Claimant had limitations/restrictions referable to the October 31, 2006 accident, but he chose not to rely on these opinions. (Transcript 304/17-305/11). At the time of hearing, Mr. Brownell elaborated on how he reached the conclusion that the subject accident combined with Claimant's pre-existing condition to cause total and permanent disability:

Q. What is your opinion, that she is only able to perform services of limited quality, quantity and dependability that no reasonable stable market for those services exists, in support of your opinion that this limitation on ability to find employment is a result - - result of the - - combined result of the accident injury and her pre-accident condition? What is the basis of that statement?

You say they combined. What she had prior to the October 31st, 2006, accident injury combined with what she had after that as developed into FCE by Mr. Bengston in August of 2007?

A. That's exactly it. It's combined to the previous and relying on Mark Bengston and the 2006 injury.

Q. Okay.

A. That combination.

Q. And how do they combine, those two conditions, the - -

A. It's an upper back and lower back. And just simply put, it's a combination. The upper is more concerning to me than the lower was, because of the reaching. Okay. Big factor. Big factor for employment.

Q. After the - - at the time of the FCE in August of 2007, Mr. Bengston documents with his FCE that Kelli Sevy, because of that, was no longer able to perform her jobs - - or the jobs - - two jobs at Silver Valley Labs.

A. Yes.

Q. That situation then was different than what she was doing prior to her accident and injury, correct?

A. Yes.

As noted, Mr. Bengston provided no opinion on the extent to which Claimant's cervical spine limitation is derived from the subject accident versus Claimant's documented pre-existing condition. Mr. Brownell's conclusion that the subject accident did permanently worsen Claimant's condition such as to contribute to her permanent and total disability is based on his belief that Claimant was capable of performing her at time of injury job before the work accident, but is no longer capable of performing that job as a result of the work accident.

DISCUSSION AND FURTHER FINDINGS OF FACT

28. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when

evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

29. Except as qualified below, Claimant is generally credible. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

PPI

30. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

31. Dr. Larson's records reflect that he originally had no opinion on the question of whether or not Claimant suffered impairment as a consequence of the subject accident. However, at the time of his deposition he testified that the subject accident and attendant fusion revision did not add any impairment to whatever Claimant's rating might have been for her pre-existing cervical condition. (Larson Deposition 26/19-27/2). He was not asked to elaborate on his thinking in this regard, or to explain if this result would obtain by application of the AMA Guides to the Evaluation of Permanent Impairment. On the other hand, Dr. Stevens did apply the Fifth Edition of the Guides to an evaluation of Claimant's permanent physical impairment. His report persuasively demonstrates a basis for a 12% PPI rating reflecting the totality of Claimant's cervical spine impairment. Further, his report provides a rationale for apportioning this impairment rating between the effects of the subject accident and Claimant's pre-existing condition. Based on Dr. Steven's report,

the Commission concludes that Claimant has suffered a 2% PPI rating referable to the October 31, 2006 accident and attendant cervical spine fusion revision, with a 10% rating referable to the documented pre-existing cervical spine condition.

32. The only medical evidence on the question establishes that Claimant is not currently at a point of medical stability for the effects of her L2 kyphoplasty. From this, the Commission is unable to conclude that Claimant has a ratable permanent physical impairment for her L2 injury which pre-dates the subject accident.

33. There is no evidence of record which would allow the Commission to reach any conclusion concerning whether or not Claimant has a ratable permanent physical impairment for the effects of her T12 compression fracture.

34. Though the record tends to establish that Claimant suffered from symptomatic bilateral knee complaints prior to the subject accident, there is, again, a failure of the medical evidence to establish a ratable permanent physical impairment for Claimant's bilateral knee complaints prior to the date of the subject accident.

Disability

35. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

36. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

37. Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425, *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

38. This case involves the issue of whether Claimant’s disability should be apportioned between the effects of the subject accident and certain pre-existing conditions. The Idaho Supreme Court recently clarified that apportionment under Idaho Code § 72-406 requires a two-step approach when considering the issue of apportionment in a less than total case. First, Claimant’s disability must be evaluated in light of all her physical impairments resulting from the industrial accident and any pre-existing conditions. Thereafter, the Commission must apportion the amount of permanent disability attributable to the industrial accident. *See, Page v. McCain Food, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). Of course, Idaho Code § 72-406 applies only in less than total cases. A second statutory mechanism exists to apportion responsibility in a case of total and permanent

disability. Once an injured worker has been judged to be permanently and totally disabled, either because she is found to be 100% disabled or by way of the odd-lot doctrine, the Industrial Special Indemnity Fund (ISIF) may be held responsible for some portion of that total and permanent disability if the following elements of ISIF liability are satisfied:

(1) It must be demonstrated that Claimant suffered from a pre-existing physical impairment;

(2) It must be shown that the pre-existing physical impairment was manifest;

(3) It must be shown that the pre-existing physical impairment constituted a subjective hindrance to Claimant's employment; and

(4) It must be shown that the pre-existing physical impairment combined with the industrial accident to cause total and permanent disability. *See, Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

39. Accordingly, regardless of whether apportionment is sought under Idaho Code § 72-406 or Idaho Code § 72-332, a necessary first step is the evaluation of Claimant's disability as of the date of hearing. If Claimant is adjudged to be less than totally and permanently disabled, then apportionment can be considered under Idaho Code § 72-406. If Claimant is adjudged to be totally and permanently disabled, then potential ISIF liability is evaluated under Idaho Code § 72-332.

40. Here, neither of the vocational experts retained to provide opinions in this case have rendered opinions on the extent and degree of Claimant's disability. The closest Dr. Collins came to providing an opinion on Claimant's disability was her observation that with light duty restrictions, Claimant has lost approximately 35% access of her time of injury labor market. On the other hand, Mr. Brownell, without rendering an opinion on

Claimant's numerical disability rating, opined that Claimant falls into the odd-lot category, as an individual who is able to perform only services so limited in quality, quantity or dependability that no reasonably stable labor market for those services exists.

41. Careful consideration of the opinions of Mr. Brownell and Dr. Collins leaves the Commission unable to define a specific numerical disability rating based on the totality of Claimant's physical ailments and relevant non-medical factors. The vocational experts' treatment of Claimant's reaching limitations further clouds the issue of Claimant's disability. Dr. Collins testified that the SkillTRAN program she employed did not provide a way to incorporate the Claimant's limitation against overhead reaching. Therefore, she did not include a reaching limitation in her use of the program. Mr. Brownell, on the other hand, appears to have overstated Claimant's reaching limitations in his use of the program, resulting in an inflated assessment of Claimant's disability. While Dr. Collins testified that Claimant has access to at least two-thirds of her pre-injury labor market, she failed to explain whether, or to what extent, Claimant is otherwise qualified to perform the sedentary and light-duty jobs which remain in her labor market. Our synthesis of these opinions is that Claimant's manifold physical injuries, considered in light of her labor market, lack of significant transferable jobs skills and her poor education leave her profoundly disabled, probably in the range of 50-75% of the whole person as of the date of hearing.

Odd-Lot

42. Even though Claimant has failed to establish total and permanent disability by demonstrating that she is 100% disabled, she may nevertheless prove total and permanent disability under the odd-lot doctrine. Claimant may prove her odd-lot status by

showing that she has attempted other types of employment without success, by showing that she, or vocational counselors on her behalf, have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *See Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

43. Claimant cannot qualify as an odd-lot worker under the first prong of the test; she successfully obtained and performed work after recovering from the October 31, 2006 accident. She was employed by the State of Idaho to provide care for three young children under the ICCP program. She successfully performed this work until her daughter was incarcerated. Second, Claimant has failed to produce evidence showing that she, or others on her behalf, have searched for other work for her, but that none is available. Claimant did not conduct a meaningful work search following her recovery, although she was employed by the ICCP from July 2010 through April 2011. What work search she did perform was cursory and performed only in the two months prior to hearing.

44. Finally, we have found that Claimant's testimony concerning the significant worsening of her condition following the subject accident should be given less weight than the opinions of Drs. Stevens and Larson. Claimant is capable of performing all sedentary and light duty work in her labor market, as well as a good deal of work qualifying as medium duty. As Dr. Collins has explained, that Claimant can perform sedentary and light duty work means that she has the physical ability to perform two-thirds of the jobs in the labor market. While we recognize that Claimant is not otherwise qualified to perform roughly two-thirds of the jobs remaining in her labor market, we nevertheless believe that her physical abilities and her skill set are such that it would not be futile for her to look for work in her labor market. Accordingly, we find that Claimant cannot meet her burden of

establishing total and permanent disability under the odd-lot doctrine.

Apportionment

45. Having found Claimant to be less than totally and permanently disabled, we must next consider whether apportionment of the disability is appropriate under Idaho Code § 72-406. Ordinarily, we would be obligated to define, with greater specificity, the extent of Claimant's less than total disability. However, for the reasons explained below, the Commission does not feel it necessary to define the precise extent of Claimant's disability from all causes combined in order to come to a resolution of this matter. Simply, on the evidence before us, we are unable to conclude that except for the addition of a 2% PPI rating, the subject accident did anything to contribute, on a permanent basis, to Claimant's disability.

46. Central to our conclusion in this regard is our assessment that the subject accident of October 31, 2006 did not do anything to increase the functional disability from which Claimant clearly suffered as a result of her pre-existing conditions. As noted above, we have found that Dr. Stevens' report persuasively establishes that Claimant has suffered a 2% PPI rating as a consequence of the October 31, 2006 accident and associated fusion revision. However, in order to determine whether the subject accident has caused additional disability over and above the impairment rating, it is necessary to understand how, or whether, that accident has impacted Claimant's ability to engage in gainful activity. If the subject accident did not cause any change in Claimant's functional ability, i.e., if she was not given any permanent limitations/restrictions as the result of that accident, then it is difficult to support a conclusion that the subject accident has, in any way, contributed to Claimant's disability in an amount over and above the 2% PPI rating to

which she is entitled.

47. Dr. Stevens has proposed that Claimant has no limitations/restrictions whatsoever with respect to her cervical spine condition. Similarly, Dr. Larson, Claimant's treating physician, has testified that if Claimant does have any limitations/restrictions referable to her cervical spine, those limitations are entirely the consequence of the documented pre-existing condition, not Claimant's work accident of October 31, 2006. Dr. Larson also believed that the limitations/restrictions identified by Mr. Bengston in the course of the FCE were referable to thoracic and lumbar spine injuries instead of the October 31, 2006 accident. However, Mr. Bengston clearly testified that certain of Claimant's limitations/restrictions are referable to her cervical spine condition. Importantly, however, Mr. Bengston did not provide any testimony on the question of whether or not, or to what extent, Claimant's cervical spine limitations/restrictions are referable to the subject accident versus Claimant's documented history of pre-existing cervical spine injury. In short, his testimony does not support a finding that Claimant has limitations/restrictions that are referable to the subject accident of October 31, 2006.

48. In the final analysis, the only support in the record for a finding that Claimant's functional abilities were permanently impacted by the accident of October 31, 2006 is found in the testimony of Claimant herself. Claimant testified that the October 31, 2006 accident caused a permanent worsening of her condition. Relying on this testimony, Mr. Brownell found that the subject accident did combine with Claimant's pre-existing conditions to contribute to her disability because Claimant was able to perform her time of injury job before the subject accident and was unable to perform her job following the accident. However, as demonstrated by Claimant's own testimony, she was only able to

perform her time of injury job by adopting a number of strategies to modify the manner in which her work was done. She slid heavy buckets with her foot rather than pick them up. She used a stick and a hook made by her husband to drag heavy items across the floor rather than pick them up. She employed the assistance of others to help her with heavier tasks. She was performing a lighter duty job at the time of the October 31, 2006 accident. In short, there is a dearth of evidence supporting the proposition that without significant accommodation Claimant was, in fact, capable of performing the jobs described in the ICRD JSE's as of the date of the October 31, 2006 accident.

49. We find Claimant's testimony that she experienced a permanent worsening of her condition following the October 31, 2006 accident to be unpersuasive. More persuasive to the Commission is the testimony of Dr. Larson, as supported by his records and objective medical testing. Claimant suffered from non-work related disease of the cervical spine which led to spinal fusion surgery on May 15, 2006. Claimant may or may not have reached a point of medical stability from this surgery by the time the accident of October 31, 2006 occurred. Regardless, although Claimant has successfully demonstrated that the October 31, 2006 accident did cause a fracture of the C5-6 fusion mass, there is no evidence that that accident caused additional injury at levels above or below C5-6. Claimant received appropriate medical care for the C5-6 fracture and follow-up medical records demonstrate a solid fusion at C5-6. Although Claimant has gone on to require additional surgery at C4-5, the parties are in agreement that the subject accident did not contribute to the need for that surgery. Claimant's treating physician has cogently testified that with the successful fusion revision, Claimant has returned to base line without any additional limitations that can fairly be referred to that accident. We find this testimony

persuasive.

50. Even though Claimant's disability is probably in the range of 50-75 percent of the whole person, inclusive of her impairments, we are unable to conclude that the subject accident did anything but cause an additional 2% permanent physical impairment of Claimant's cervical spine. Specifically, the subject accident did not cause any additional permanent limitations/restrictions which could be responsible for contributing to Claimant's disability.

51. Even were we to assume that Claimant is totally and permanently disabled under the odd-lot doctrine, it is clear that Claimant cannot meet her burden of establishing ISIF liability. Our finding that Claimant has failed to demonstrate that she has any limitations/restrictions of a permanent nature which can be referred to the subject accident means that she cannot demonstrate her burden of two of the four elements of ISIF liability.

52. The "subjective hindrance" prong of the test for ISIF liability finds its genesis in the statutory definition of permanent impairment together with additional language enacted by the legislature in 1981:

"Permanent physical impairment" is defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjective as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

Idaho Code § 72-332(2) (emphasis added).

53. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d

557, 563 (1990):

Under this test, evidence of the claimant's attitude toward the pre-existing condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the pre-existing condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant.

Since we have found that the subject accident did not contribute to Claimant's limitations/restrictions, we find that the October 31, 2006 accident does not constitute a hindrance or obstacle to employment.

54. As part of this prima facie case, Claimant bears the burden of establishing that her pre-existing physical impairments "combined with" her work-related impairments such as to result in total and permanent disability. Claimant bears the burden of demonstrating that she would not have been totally disabled in the absence of her work accident. *See, Garcia v. J.R. Simplot Company*, 115 Idaho 966, 772 P.2d 1973 (1989); *Bybee v. State Industrial Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996). Here, Claimant cannot demonstrate that the subject accident combined with her documented pre-existing conditions to cause total and permanent disability. The subject accident did not result in any additional limitations/restrictions which impacted Claimant's ability to engage in gainful activity.

55. Even if Claimant were found to be totally and permanently disabled under the odd-lot doctrine, she cannot meet at least two elements of her prima facie case against

the ISIF.


CONCLUSIONS OF LAW AND ORDER

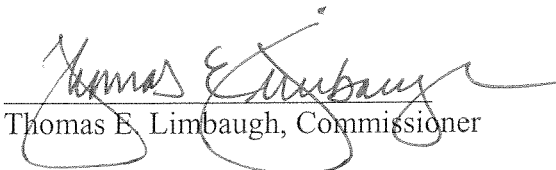
1. Claimant is entitled to, and has received, time-loss and medical benefits associated with the accident of October 31, 2006.
2. As a consequence of the subject accident, Claimant suffered PPI of 2% of the whole person. She is entitled to the payment of a rating in this amount at the appropriate rate.
3. Claimant has permanent disability in the range of 50 to 75% of the whole person. Claimant has failed to establish that she has suffered any disability as a result of the subject accident over and above her 2% PPI rating.
4. Claimant has failed to establish that she is totally and permanently disabled under the odd-lot doctrine.
5. Even if it be assumed that Claimant is totally and permanently disabled under the odd-lot doctrine, she has failed to establish the elements of ISIF liability.
6. The issue of *Carey* apportionment is moot.
7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 9th day of January, 2013.

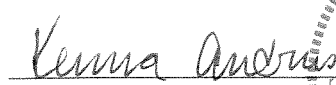
INDUSTRIAL COMMISSION


Thomas P. Baskin, Chairman


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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Attorney for Claimant Sevy

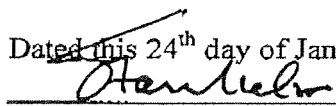
BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

KELLI SEVY	:	I.C. No. 06-526107
Claimant,	:	
	:	MOTION FOR RECONSIDERATION
vs,	:	
SVL ANALYTICAL, INC.	:	
Employer,	:	
and	:	
STATE INSURANCE FUND,	:	
Surety,	:	
and	:	
STATE OF IDAHO INDUSTRIAL	:	
SPECIAL INDEMNITY FUND	:	
Defendants.	:	

FILED
JAN 24 2013
INDUSTRIAL COMMISSION

COMES NOW the Claimant by and through her attorney, Starr Kelso, and hereby respectfully moves the Commission for Reconsideration of its decision in this matter. Claimant's Motion is supported by the recitation of the factual findings and legal conclusions with which the moving party takes issue as set forth in the Claimant's Brief in Support of Motion for Reconsideration filed herewith.

Dated this 24th day of January, 2013.


Starr Kelso, Attorney for Claimant Sevy

1. MOTION FOR RECONSIDERATION

ORIGINAL

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BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

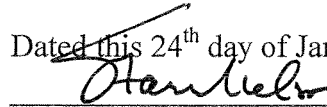
KELLI SEVY	:	I.C. No. 06-526107
Claimant,		
		MOTION FOR RECONSIDERATION
vs.	:	
SVL ANALYTICAL, INC.		
Employer,	:	
and	:	
STATE INSURANCE FUND,	:	
Surety,	:	
and	:	
STATE OF IDAHO INDUSTRIAL	:	
SPECIAL INDEMNITY FUND	:	
Defendants.	:	

INDUSTRIAL COMMISSION

FILED
JAN 29 2013

COMES NOW the Claimant by and through her attorney, Starr Kelso, and hereby respectfully moves the Commission for Reconsideration of its decision in this matter. Claimant's Motion is supported by the recitation of the factual findings and legal conclusions with which the moving party takes issue as set forth in the Claimant's Brief in Support of Motion for Reconsideration filed herewith.

Dated this 24th day of January, 2013.



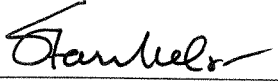
Starr Kelso, Attorney for Claimant Sevy

1. MOTION FOR RECONSIDERATION

CERTIFICATE OF SERVICE: I hereby certify that a copy of the foregoing was faxed on the 24th day of January, 2013, to the respective attorneys for the Defendants as follows:

H. James Magnuson
Attorney at Law
Fax No. 208- 666-1700

Thomas W. Callery
Attorney at Law
Fax No. 208-746-9553



Starr Kelso

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLI SEVY,

Claimant,

v.

SVL ANALYTICAL, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2006-526107

**ORDER DENYING
RECONSIDERATION**

FILED

FEB 14 2014

INDUSTRIAL COMMISSION

Claimant made a timely motion for reconsideration of the Commission's decision in the above-captioned case on January 29, 2013. Claimant argues that the Commission erred in its findings, conclusions and order filed on January 9, 2013. In that decision, the Commission held that Claimant likely suffered disability in the range of 50% to 75% of the whole person from all causes combined. The Commission also found that Claimant failed to meet her burden of establishing total and permanent disability via the odd lot doctrine. Having found that Claimant was less than totally and permanently disabled, the Commission next concluded that except for a 2% PPI rating, the subject accident did not contribute to Claimant's disability from all causes combined. This conclusion derived from the Commission's adoption of the opinion expressed by Dr. Larson that the subject accident did nothing to increase Claimant's permanent

limitations/restrictions. Finally, the Commission concluded that even if it be assumed that Claimant is totally and permanently disabled, her claim against the ISIF would fail because the evidence fails to establish that she could satisfy the “subjective hindrance” and “combining with” components of the test for ISIF liability.

In support of her motion for reconsideration, Claimant argues that having found Claimant to be generally credible, the Commission cannot disregard her testimony, which establishes that the subject accident permanently worsened her ability to engage in physical activities. Next, Claimant argues that Dr. Larson’s opinion concerning the impact of the work accident on Claimant’s ability to engage in gainful activity should be disregarded because it conflicts with Claimant’s testimony and the functional capacity evaluation (FCE) performed by Mark Bengston.

Claimant argues that the Commission erred in concluding that Claimant failed to establish total and permanent disability by the 100% method. She further argues that the Commission erred in rejecting her assertion that she is totally and permanently disabled under the odd lot doctrine. She contends that the evidence establishes that she has tried other types of employment without success. She contends that she, or others on her behalf, have searched for employment and found none available. She contends that because of her profound physical limitations/restrictions, and in particular, her restriction against overhead reaching on more than an occasional basis, it would be futile for her to seek suitable employment.

Defendant ISIF and Defendant Employer argue that Claimant has failed to present new reasons, factually or legally, to support reconsideration of the Commission decision. They argue that the Commission decision is well supported by the record. In addition, the ISIF argues that the evidence of record supports the Commission’s determination that Claimant has failed to

prove odd lot status by any of the three methods articulated in *Huerta v. School District 431*, 116 Idaho 43, 773 P.2d 1130 (1989). The ISIF also argues that Claimant continues to misinterpret SkillTRAN analysis results, which figure in the vocational opinions rendered by Mr. Brownell and Dr. Collins.

DISCUSSION

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. J.R.P. 3(f) states that a motion to reconsider “shall be supported by a brief filed with the motion.” Generally, greater leniency is afforded to *pro se* claimants. However, “it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented.” Curtis v. M.H. King Co., 142 Idaho 383, 388, 128 P.3d 920 (2005). On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. Davison v. H.H. Keim Co., Ltd., 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See* Dennis v. School District No. 91, 135 Idaho 94, 15 P.3d 329 (2000) (citing Kindred v. Amalgamated Sugar Co., 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the

Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

Claimant's Credibility

This case was heard by Referee Donohue. In his proposed decision, which was not adopted by the Industrial Commission, Referee Donohue offered the following observations relating to Claimant's credibility as a witness:

Claimant makes a good first impression. At hearing, she appeared to be minimizing her physical reactions to pain and discomfort. Her increase in emotional and physical behaviors while testifying about tripping over the dog and requiring a second surgery appeared modest and genuine.

Claimant is credible. Her demeanor and testimony were consistent with other evidence of record.

In its decision, the Commission made the following finding concerning Claimant's credibility as a witness:

Except as qualified below, Claimant is generally credible. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

Thereafter, the Commission explained why it chose to accept Dr. Larson's opinion that Claimant had no additional limitations/restrictions referable to the subject accident over Claimant's testimony that the subject accident caused a significant permanent loss of function. Claimant argues that having taken no issue with the Referee's finding on Claimant's credibility, the Commission should have elevated Claimant's testimony over the opinion of Dr. Larson, especially where his opinion is challenged by certain internal inconsistencies in his testimony.

The Commission's findings on credibility are bifurcated into two categories, "observational credibility" and "substantive credibility". As stated in *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003):

Observational credibility “goes to the demeanor of the appellant on the witness stand” and it “requires that the Commission actually be present for the hearing” in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. The Commission’s findings regarding substantive credibility will only be disturbed on appeal if they are not supported by substantial competent evidence.

Since the Commission did not hear this case, the Commission may not make findings concerning Claimant’s credibility on the witness stand. The Commission did not disturb the Referee’s findings in this regard. However, the Commission is fully empowered to weigh the substance of Claimant’s testimony against other facts of record and make its own decision about Claimant’s substantive credibility.

Central to the Commission’s original decision is the opinion of Dr. Larson, Claimant’s treating physician. Dr. Larson performed Claimant’s first spinal surgery in 2006, followed her during her period of recovery from that procedure and again treated her for the effects of the subject accident. He is peculiarly qualified to address the extent and degree to which Claimant’s current limitations/restrictions are referable either to the subject accident, Claimant’s pre-existing cervical spine condition or some combination of the two. Because of his unique knowledge concerning Claimant’s pre-injury and post-injury condition, the Commission found persuasive his testimony that while the subject accident is responsible for causing or contributing to the failure of the C5-6 fusion, the accident did nothing to increase Claimant’s permanent limitations/restrictions. Dr. Larson succinctly explained his opinion in this regard:

Q. Now, focusing on the C5-6 issue, was there any limitations or restrictions that arose out of when she tripped over the dog at work?

A. What do you meant?

Q. Would there be any limitations or restrictions that would be - - I guess were there any limitations or restrictions to her - - to her from her C5-6 fusion?

A. I'll have to look and see. It was my opinion that she had been at MMI. I don't know if I did her - - I don't remember if anyone else did. I don't think there are any new limitations to her based on the pseudarthrosis that I treated.

Q. Okay. So if she had any limitations or restrictions related to her cervical condition, those would be related to the degenerative condition you treated in May of 2006; is that correct?

A. If they were at C5-6, yes.

Q. Okay. So there were no new limitations, restrictions just because of the fusion redo?

A. No.

This testimony is not challenged by other medical opinion of record. While Mark Bengston did find that Claimant had some limitations/restrictions referable to her cervical spine condition, Mr. Bengston's testing did not shed any light on whether those limitations/restrictions predated or postdated the accident. His findings are not inconsistent with Dr. Larson's opinion that Claimant has no limitations/restrictions referable to the subject accident. We recognize that Dr. Larson labored under the belief that the limitations/restrictions identified by Mr. Bengston do not contain any restrictions related to the cervical spine, while Mr. Bengston's testimony makes it clear that some of the limitations/restrictions he identified do relate to the cervical spine. However, we do not believe Dr. Larson's misunderstanding in this regard denigrates his opinion on the cause of Claimant's limitations/restrictions referable to Claimant's cervical spine.

Against Dr. Larson's testimony, Claimant has testified that as a result of the subject accident she has suffered a permanent worsening of her cervical spine condition. As explained in our original decision, in resolving this conflict in the evidence, we find the opinion of Dr. Larson and Dr. Stevens to be more persuasive.

There is another substantive credibility issue implicated in Claimant's motion for reconsideration. Claimant acknowledges that on cross-examination she conceded that she

performed no work search until November of 2011, which was several years after her date of medical stability, and shortly before the subject hearing. Claimant argues that this testimony was elicited from Claimant after being on the witness stand for several hours and was the result of fatigue, confusion, or pain medication. Claimant asserts that this testimony should therefore be ignored in favor of testimony elicited on redirect that Claimant performed a work search in October, November and December of 2007 following the termination of her employment with SVL. In fact, a careful review of the hearing transcript reveals that the explanation proffered by Claimant does not bear close scrutiny; there is other evidence of record which denigrates the assertion that the testimony she gave concerning a 2011 work search was the result of confusion, fatigue or overmedication.

At hearing, under examination by her attorney, Claimant testified, apparently for the first time, to a job search she performed after leaving SVL. She initially testified that she looked around a little bit for work after leaving SVL, but then described a number of employers she contacted about work. These included Harvest Foods, Yokes, Dave Smith Motors, Subway, Silver Spoon, McDonalds, Wayside Market, Wal-Mart, and Silver Mountain.

On cross-examination, counsel for Defendants asked Claimant why, if she had actually looked for work at the places she identified in 2007, she failed to describe this search in her 2009 and 2011 depositions, and in her answers to interrogatories. Claimant explained that the answers she gave during discovery were accurate; she did not start her work search until after her 2011 deposition. (*See* hearing transcript 176/21-177/16). On redirect, Claimant recanted and again testified that the work search she performed was undertaken in October, November and December of 2007. Claimant's testimony is internally inconsistent, and the explanation she has offered to explain this inconsistency on reconsideration is inconsistent with the fact that on at

least three separate occasions prior to the date of hearing she denied looking for or applying for work prior to 2011. We find Claimant's explanation for her testimony that her work search was performed in the fall of 2011 to be untenable.

In summary, we continue to abide by our decision that certain aspects of Claimant's testimony are challenged by other facts of record. Specifically, we continue to believe that Dr. Larson's testimony is entitled to greater weight than that of Claimant on the issue of whether Claimant has any limitations/restrictions referable to the subject accident.

Odd-Lot Determination

Next, Claimant takes issue with the Commission's treatment of the elements of proving odd lot status. An employee may prove total disability under the odd lot doctrine in one of three ways:

- (1) By showing that she has attempted other types of employment without success;
- (2) By showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or
- (3) By showing that any efforts to find suitable employment would be futile.

In its decision, the Commission ruled that Claimant could not meet her burden of proving odd lot status by the first method, since she had failed to adduce evidence demonstrating that she had attempted other work without success. In fact, Claimant demonstrated an ability to work 40 hours per week under the Idaho Child Care Program (ICCP), providing child care to a five year old, an eight year old and a newborn. Claimant argues that the fact of her employment by the ICCP should be disregarded since, per the testimony of Dan Brownell, such employment is "sheltered" and "sympathetic". (See transcript of hearing 266/6-267/6). Notwithstanding that Mr. Brownell's testimony in this regard is somewhat lacking in foundation, we do not believe that his assertions, even if true, do anything to assist Claimant in meeting her burden of proof

under the first method. Simply, the fact that Claimant may have found work in a sheltered environment does nothing to prove that she has attempted other types of employment without success.

Next, Claimant challenges the Commission's conclusion that the evidence fails to establish that Claimant, or someone on her behalf, searched for other work, yet found none available. Claimant testified that between her 2007 date of medical stability and the date of hearing she made contacts with 10 potential employers. Regardless of whether these contacts took place in 2007 or in the fall of 2011, we deem this work search to be inadequate to meet Claimant's burden of proving odd lot status under the second method.

Finally, Claimant alleges that the testimony of Mr. Brownell establishes that it would be futile for Claimant to search for work, as demonstrated by the results of the SkillTRAN analysis performed by Mr. Brownell, or at his instance. As we pointed out in our original decision, we believe the reliance on the results of the SkillTRAN analysis is misplaced. Claimant has restrictions against engaging in overhead reaching on more than an occasional basis. She has no restrictions against other types of reaching that might be required in other types of employment. However, because of the way data is collected by the U.S. Department of Labor, the SkillTRAN system is incapable of applying Claimant's specific restriction to the database of jobs; SkillTRAN only allows the evaluator to screen out jobs that involve upper extremity reaching generally, without the ability to fine tune for a specific type of prohibited reaching. (Truthan deposition 68/25-74/15). Most jobs in the workplace require upper extremity reaching of some type. Withdrawing jobs that require some type of reaching from Claimant's labor market results in a loss of up to 90% of the labor market. However, using SkillTRAN in this fashion would

remove from Claimant's labor market any number of jobs (how many, we do not know) that she is actually capable of performing per Mr. Bengston.

In short, we find no reason to reconsider our decision that Claimant has failed to adduce evidence demonstrating that it would be futile for her to search for employment.

For the reasons stated above, the Commission declines to reconsider the previously issued decision.

ORDER

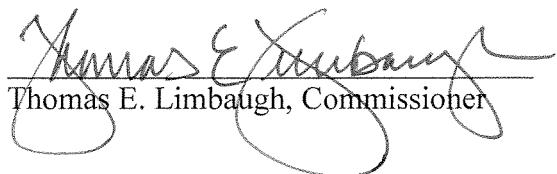
Based on the foregoing reasons, Claimant's request for reconsideration is **DENIED. IT IS SO ORDERED.**

DATED this 14th day of February, 2014.

INDUSTRIAL COMMISSION


Thomas P. Baskin, Chairman


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February 2014, a true and correct copy of the foregoing **ORDER DENYING ON RECONSIDERATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE, ID 83816

H.JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

Kenna Andrus

Faxed
Copy

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, ID 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Claimant Mead

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLI SEVY,

Appellant/Claimant,
v.

SVL ANALYTICAL, INC.,

Respondent/Employer,
and

STATE INSURANCE FUND,

Respondent/Surety,
and

STATE OF IDAHO INDUSTRIAL SPECIAL
INDEMNITY FUND,

Respondent.

I.C. NO. 2006-526107

NOTICE OF APPEAL

FILED

INDUSTRIAL COMMISSION

TO: THE ABOVE NAMED RESPONDENTS SVL ANALYTICAL, INC., STATE INSURANCE FUND, AND THE STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, AND YOUR RESPECTIVE ATTORNEYS H. JAMES MAGNUSON AND THOMAS W. CALLERY

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Kelli Sevy, appeals from the Findings of Fact, Conclusions of Law and Order entered by the State of Idaho Industrial Commission on January 9,

1. NOTICE OF APPEAL

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, ID 83816
Tel: 208-765-3260
Fax: 208-664-6261

ORIGINAL

Attorney for Claimant Mead

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLI SEVY,

Appellant/Claimant,
v.

SVL ANALYTICAL, INC.,

Respondent/Employer,
and

STATE INSURANCE FUND,

Respondent/Surety,
and

STATE OF IDAHO INDUSTRIAL SPECIAL
INDEMNITY FUND,

Respondent.

I.C. NO. 2006-526107

NOTICE OF APPEAL

RECEIVED
INDUSTRIAL COMMISSION
JUN 26 10 37

TO: THE ABOVE NAMED RESPONDENTS SVL ANALYTICAL, INC., STATE INSURANCE FUND, AND THE STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, AND YOUR RESPECTIVE ATTORNEYS H. JAMES MAGNUSON AND THOMAS W. CALLERY

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Kelli Sevy, appeals from the Findings of Fact, Conclusions of Law and Order entered by the State of Idaho Industrial Commission on January 9,

1. NOTICE OF APPEAL

2013, and the Order Denying Reconsideration entered by the State of Idaho Industrial Commission on February 14, 2014.

2. The Appellant has the right to appeal to the Idaho Supreme Court and the said Findings of Fact, Conclusions of Law and Order entered by the State of Idaho Industrial Commission and the February 14, 2014, Order Denying Reconsideration entered by the State of Idaho Industrial Commission are appealable orders under and pursuant to Idaho Appellate Rule 11 (d).

3. Preliminary statement of the issues on appeal:

(a) Whether the Commission erred in holding, despite the Claimant suffering a 2% whole person permanent partial impairment and being unable to return to her time of injury employer, that she failed to prove she suffered disability in excess of impairment?

(b) Whether the Commission's findings of fact are supported by substantial competent evidence.

4. No order has been issued sealing all or a part of the record.

5. (a) Is a reporter's transcript requested?

A copy of the hearing transcript was prepared prior to the original briefing. As a result it is anticipated that the hearing transcript should be contained in and become a part of the requested record on appeal. If it is not, one is requested. A standard transcript of the hearing is requested. It was transcribed prior to briefing in this matter and thus it can be contained in the record on appeal as an Exhibit.

6. It is requested that the Record on appeal include:

(a) All original or amended complaints and answers.

(b) All Exhibits admitted into evidence and all Exhibits offered but not admitted.

2. NOTICE OF APPEAL

- (c) All affidavits considered by the Industrial Commission.
- (d) All post-hearing depositions taken by all parties.
- (e) All motions and briefs/memorandums including but not limited to Claimant's Opening and Reply Briefs and each of the Defendants' Briefs.
- (f) Referee Donohue's Findings of Fact, Conclusions of Law, and Recommendation.
- (g) The Industrial Commission's Findings of Fact, Conclusions of Law, and Order.
- (h) Claimant's Motion for Reconsideration, Claimant's Brief in Support of Motion for Reconsideration, Claimant's Response to Defendants' Briefs Regarding Motion for Reconsideration, Employer's Brief in Opposition to Claimant's Motion for Reconsideration, and ISIF's Response to Claimant's Motion for Reconsideration.
- (i) The Industrial Commission's Order Denying Reconsideration.

7. I certify:

- (a) A copy of this Notice of Appeal has not been served on a court reporter because the hearing transcript in this matter was previously prepared for consideration of the Industrial Commission and should be a part of the Record on Appeal. If not, a Notice of Appeal will be served on the court reporter.
- (b) The clerk of the Idaho Industrial Commission has not been paid an estimated fee for preparation of the reporter's transcript because the reporter was previously paid for the transcript which should be a part of the Record on Appeal. If not, upon notice from the Industrial Commission, the estimated fee will be paid.
- (c) The estimated fee for preparation of the Idaho Industrial Commission's clerk's Record has been paid.
- (d) The appellate filing fee has been paid.

3. NOTICE OF APPEAL

(e) Service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 24th day of March, 2014.



Starr Kelso, Attorney for Appellant Sevy

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed by regular U.S. Mail, postage prepaid thereon, on the 24th day of March, 2014, to:

H. James Magnuson
Attorney at Law
P.O. Box 2288
Coeur d'Alene, Idaho 83816
Attorney for Respondent Employer/Surety

Thomas W. Callery
Attorney at Law
P.O. Box 854
Lewiston, Idaho 83501
Attorney for ISIF



Starr Kelso

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RECEIVED
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CLERK OF APPEALS

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KELLI SEVY,

Claimant/Appellant,

v.

SVL ANALYTICAL, INC., Employer and
STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants/Respondents

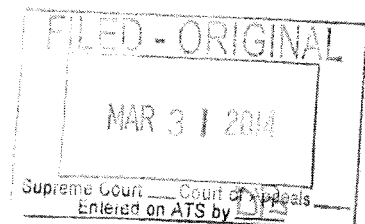
SUPREME COURT NO.

CERTIFICATE OF APPEAL

Supreme Court No. 41994

Appeal From:	Industrial Commission, Thomas P. Baskin, Chairman presiding
Case Number:	IC 2006-526107
Order Appealed from:	Findings of Fact, Conclusions of Law, and Order, filed January 9, 2013, and Order Denying Reconsideration, filed February 14, 2014.
Attorney for Claimant/Appellant:	Starr Kelso PO Box 1312 Coeur d'Alene, ID 83816
Attorney for Employer-Surety/ Respondents:	H. James Magnuson PO Box 2288 Coeur d'Alene, ID 83816
Attorney for ISIF/Respondent:	Thomas Callery PO Box 854 Lewiston, ID 83501

CERTIFICATE OF APPEAL FOR KELLI SEVY - 1



Appealed By: Claimant/Appellant Kelli Sevy

Appealed Against: Defendants/Respondents SVL Analytical, Inc.,
Employer & State Insurance Fund, Surety; and State
of Idaho Industrial Special Indemnity Fund.

Notice of Appeal Filed: March 24, 2014

Appellate Fee Paid: \$109.00 to Supreme Court and
\$100.00 to Industrial Commission
Checks were received.

Name of Reporter: Patricia L. Pullo,
M&M Court Reporting Service, Inc.

Transcript Requested: Standard transcript has been requested. Transcript
has been prepared and filed with the Commission.

Dated: March 27, 2014

Kiana Andrews
Assistant Commission Secretary

CERTIFICATION

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal; Findings of Fact, Conclusions of Law, and Order; and Order Denying Reconsideration, and the whole thereof, in IC case number 2006-526107 for Kelli Sevy.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 27th day of March, 2014.


Kenna Andrus
Assistant Commission Secretary

CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 41994 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 17th day of April, 2014.

Kenna Andrus
Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

KELLI SEVY,

Claimant/Appellant,

v.

SVL ANALYTICAL, INC., Employer, and
STATE INSURANCE FUND, Surety,

and

STATE OF IDAHO INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants/Respondents.

SUPREME COURT NO. 41994

NOTICE OF COMPLETION

TO: STEPHEN W. KENYON, Clerk of the Courts;
Starr Kelso for the Appellants;
H. James Magnuson for Respondent Employer/Surety; and
Thomas Callery for Respondent ISIF.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and,
pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been
served by regular U.S. mail upon each of the following:

Attorney for Appellant: Starr Kelso
Po Box 1312
Coeur d'Alene ID 83816

Attorney for Respondent Employer/Surety: H. James Magnuson
PO Box 2288
Coeur d'Alene, ID 83816

Attorney for Respondent ISIF: Thomas Callery
PO Box 854
Lewiston, ID 83501

NOTICE OF COMPLETION (KELLI SEVY - 41994) - 1

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions. In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 17th day of April, 2014.

Kenna Andrus
Kenna Andrus
Assistant Commission Secretary